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CALIFORNIA REPORTER

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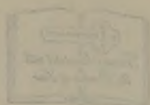
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SUPREME COURT OF CALIFORNIA.

2 Cal. Unrep. 226

KEATING

v.

EDGAR.

Filed December 8, 1883.

An appeal will be considered abandoned when the appellant fails to file his points prior to the day set for argument, as required by the rule, or to file a brief within the time allowed by the court.

In Bank.

BY THE COURT. No points were filed by appellant prior to the day on which the cause was set for argument, as required by rule, nor has appellant filed a brief within the time allowed by the court. We feel justified in treating the appeal as abandoned, but have looked into the record and are not satisfied that error was committed by the court below.

Judgment and order affirmed.

2 Cal. Unrep. 226

PEOPLE

v.

LEE HUNG.

Filed December 10, 1883.

Arson—Instructions—Judgment affirmed.

In Bank.

BY THE COURT. The seventh and ninth instructions asked by defendant's counsel were substantially given in the charge of the court; therefore the refusal of the request was not error.

The court did not err in instructing the jury that it was not necessary to prove that the defendant occupied the building which was burned, or that he was ever at any time the tenant of M. Graff, although it was so alleged in the indictment. The allegation was wholly immaterial, and it was unnecessary to prove it. The refusal to give an instruction the exact reverse of the one given on this point was not error.

It was not error to refuse to give the following: "Arson is a crime
Cal.Rep. 1-4 P.—1

against the security of the dwelling-house as such and the possession, and not against the building as property." The court gave the Code definition of arson. That was sufficient.

Judgment and orders appealed from affirmed.

64 Cal. 373

PEOPLE *ex rel.* PROBERT and others

v.

ROBINSON and others.

Filed December 10, 1883.

Under the act of 1853, § 9, a transfer of stock, until entered upon the books of the corporation, confers on the transferee, as between himself and the corporation, no right beyond that of having such transfer properly entered; and until that is done or demanded to be done the person in whose name the stock is entered on the books of the corporation is, as between himself and the corporation, the owner to all intents and purposes, and particularly for the purposes of an election.

In Bank.

SHARPSTEIN, J. This action was brought to oust the defendants from the offices of trustees of the St. Lawrence Mining Company, and to procure a judgment to the effect that the relators are entitled to said offices. The defendants claim to have been elected at a regular election held on the ninth day of January, 1880, the day on which it is conceded an election of trustees might properly be held. But the relators claim that the election is invalid, because a majority of the capital stock of said corporation was not represented at said election.

It appears that one Bennett, who appeared by the books of the corporation to be the owner of 37,121 shares, cast the number of votes which that number of shares entitled him to, although he had previously sold 36,000 of said shares to Probert, one of the relators. But such transfer had not been entered on the books of the company. It does not appear that the right of Bennett to vote as he did was challenged, or that Probert attempted or claimed the right to cast the votes which the relators now insist he had a right to cast by virtue of his owning said shares. The validity of the election depends upon the right of Bennett to cast the votes which he might rightfully have cast if he had not sold said 36,000 shares.

By section 5 of the act of 1853, under which the company was incorporated, it is provided that each stockholder shall be entitled to as many votes as he owns shares of stock; and by section 9, that "the stock of the company shall be deemed personal estate, and shall be transferable in such manner as shall be prescribed by the by-laws of the company; but no transfer shall be valid, except between the parties thereto, until the same shall have been so entered on the books

of the company as to show the names of the parties by and to whom transferred, the number and designation of the shares, and the date of the transfer." St. 1853, p. 88.

A transfer not entered on the books of the company has no validity outside of the parties to such transfer. If not, could it affect the validity of an election at which trustees of the company were elected? If so, would not a transfer, although not entered on the books of the company, be valid outside of the parties to such transfer? The construction which we feel compelled to give to this clause is that a transfer of stock, until entered upon the books of the company, confers on the transferee, as between himself and the company, no right beyond that of having such transfer properly entered. Until that is done, or demanded to be done, the person in whose name the stock is entered on the books of the company is, as between himself and the company, the owner to all intents and purposes, and particularly for the purpose of an election. *State v. Ferris*, 42 Conn. 560; *Hopkin v. Buffum*, 9 R. I. 513; *Gilbert v. Manuf'g Iron Co.* 11 Wend. 627; *Bank of Utica v. Smalley*, 2 Com. 770; *Bank of Buffalo v. Kortright*, 22 Wend. 348; *State v. Pettineli*, 10 Nev. 141.

"As between a corporator and the corporation, the records of the corporation, or its stock-book, as it is called, is the evidence of their relation. Meetings of the stockholders, elections, and dividends, etc., are regulated by this record. The certificate is but secondary evidence, and is never demanded except when the stockholder deals with the corporation in a contract relation." *Bank of Commerce's Appeal*, 73 Pa. 59.

Whatever rights the purchaser of a certificate of stock may acquire as between himself and his vendor, it is well settled, as between himself and the corporation, he acquires only an equitable title; and until he secures a transfer on the books of the company he is not a stockholder, and has no claim to act as such. *N. Y. & N. H. R. Co. v. Schuyler*, 34 N. Y. 80; *Grymes v. Hone*, 49 N. Y. 17.

We could not hold that this election was invalid by reason of Bennett's voting as he did without holding that, as between him and Probert and the company, the transfer without being entered on its books was valid. This would be going further than the law, as we construe it, would justify us in going. The conclusion at which we have arrived renders it unnecessary to consider the question raised by the appeal of the plaintiff and relators, Probert, Myer, and Myer.

So much of the judgment as adjudges that defendants S. L. Robinson, E. N. Robinson, and Hale Rix are not entitled to the offices of trustees of the said corporation, and that they and every one of them be ousted and excluded from the said offices, and that they and each of them do not intermeddle with or concern themselves in or about the offices of trustees of the St. Lawrence Mining Company, or the liberties, privileges, and franchises thereunto belonging; but that they, and each of them, be forejudged absolutely and excluded from

exercising or using the same, or any of them, for the future, is reversed; in other respects, affirmed.

We concur. ROSS, J.; MCKINSTRY, J.; MORRISON, C. J.; MCKEE, J.

MYRICK, J., *concurring*. The court found that the stock voted by Bennett at the meeting of January, 1880, stood in his name, and that at such meeting no objection was made to his casting the votes of the stock so standing in his name. Under such circumstances I do not think the voting was void, nor that it vitiated the election. I therefore concur in the judgment.

64 Cal. 378

HEINLEN

v.

SULLIVAN and others, Judges, etc.

Filed December 10, 1883.

The power of appointment of the police commissioners of the city and county of San Francisco does not devolve upon the judges of the superior court thereof.

In Bank.

By THE COURT. Conceding that the terms of office of the police commissioners of the city and county of San Francisco have expired, the power of appointment does not devolve upon the judges of the superior court for the city and county aforesaid. The power of appointment of the commissioners referred to, vested in the judges of the fifteenth, twelfth, and fourth judicial districts of this state by the act of April, 1878, was not a judicial power, and did not pertain to the judicial system of the state; consequently it was not continued in force by section 11 of article 22 of the constitution now in force, and the power of appointment in question did not devolve on the superior judges above mentioned.

Application for writ of mandate denied.

64 Cal. 377

KNOWLES

v.

SEALE.

Filed December 10, 1883.

The omission to find on an immaterial issue is not error.

In Bank.

BY THE COURT. The allegation of the defendant that the portion of the street which the board of supervisors ordered planked had not been graded to the official grade, did not raise a material issue; therefore the omission to find on it was not error. The board had jurisdiction, after notice of its intention had been published, to order a street, the grade and width of which had been officially established, planked; and it was not denied that the grade and width of this street had been officially established before the board ordered it planked, or gave notice of its intention to order it planked.

Judgment affirmed.

64 Cal. 379

ESTATE OF HARLAND.

Filed December 14, 1883.

An appeal from the denial of the application of a widow to have a homestead set aside to her out of the estate of her deceased husband must be taken within 60 days after the decree or judgment is entered.

In Bank.

BY THE COURT. On the twenty-sixth of December, 1882, the court denied the application of appellant to have a homestead set aside to her out of the estate of her deceased husband. Notice of appeal was filed and served on the seventh day of June, 1883. We think the appeal should have been taken within 60 days after said order, decree, or judgment was rendered. Code, Civil Proc. 1715; *Estate of Burns*, 54 Cal. 223.

Appeal dismissed.

SUPREME COURT OF CALIFORNIA.

64 Cal. 380

PEOPLE

v.

SHEM AH FOOK and another.

Filed December 24, 1883.

Criminal procedure—Withdrawing plea of not guilty—Dismissing information—Penal Code, 995, 1059—Objections to testimony—Instructions—Judgment and order affirmed.

In Bank.

The Attorney General, for respondent.

W. Barry and Thos. D. Riordan, for appellant.

By THE COURT. 1. We cannot say the court below abused its discretion in refusing to allow defendants to withdraw the plea of *not guilty*, and to interpose a demurrer and motion to set aside the information.

2. Nor did the court err in denying defendants' motion to dismiss the information. On motion of defendant an information may be set aside if it be not signed by the district attorney, or if, before the filing thereof, the defendant was not legally committed by a magistrate. Penal Code, 995. In the case at bar the information was subscribed by the district attorney of the county, and the transcript does not show but that the defendants were legally committed by a magistrate.

3. The court properly disallowed defendants' challenge to the panel of jurors. There was no material departure from the forms prescribed for drawing and return of juries. Penal Code, 1059.

4, 5, 6, 7. We think the testimony of the witness Witt as to the manner and conduct of defendant Ah Fook, and the witness' statement that another person spoke of the peculiarity of defendants' manner at the time, was admissible. Nor was the testimony of the constable, Meade, as to defendants' manner and conduct when he arrested them inadmissible, taken in connection with the declarations of Shem Ah Fook.

8, 9, 10. The eighth, ninth, and tenth points of the appellants are based on objections to questions of the prosecution, on the ground that they were leading questions. It was for the court below, in its wise discretion, to permit questions leading in form.

11, 12. There was no material error in denying defendants' motion to strike out the testimony of the witness Millard, nor in over-

ruling the objection to Hubner testifying. As to the statements said by the witness to have been made by defendants in the *evening, in the sheriff's office*, and in the interval between the first and second days' proceedings before the committing magistrate, however liable to abuse such mode of securing evidence may be, we cannot say the statements of defendants, as alleged, were not voluntarily made. There is nothing in the transcript to indicate that the statements made by the defendants to each other, in their cells in the jail, were not voluntary.

13. The objection to the testimony of the witness Hubner as to admissions of Ah Tie, in conversation with Ah Ping, was properly overruled. Such admissions were proper evidence against defendant Ah Tie.

14, 15, 16. The "exceptions" or objections to statements of counsel for the people in argument, and in the presence of the jury, cannot be considered. No action of the court with reference to such statements was demanded or requested, nor was there any exception to the ruling or action of the court.

17. The court gave the instructions which were given as a charge to the jury.

18. The court did not err in instructing as to counsel reading from cases where convictions have been had upon circumstantial evidence. *People v. Cronin*, 34 Cal. 191.

Judgment and order affirmed.

64 Cal. 379

HOME LOAN ASS'N

v.

WILKINS and others.

Filed December 24, 1883.

Appeal from judgment for the sale of mortgaged premises by party in possession—order vacated—application for stay denied.

In Bank.

J. R. Brandon, for respondent.

E. A. Lawrence, for petitioner.

BY THE COURT. On the former hearing in department 2, (11 Pac. Law J. 252,) it was held that where an appeal is taken from a judgment for the sale of mortgaged premises, by one not in possession thereof, the sale might be stayed without filing an undertaking for

the payment of a deficiency arising upon such sale; and that the petitioner, not being in possession of the mortgaged premises, was entitled to have such sale stayed without filing such undertaking. It now transpires that the petitioner was in possession of such premises, and as he has not filed an undertaking for the payment of the deficiency, if any shall arise on said sale, it is not stayed by the appeal. It follows that the order made in department must be vacated, and the application for a stay be denied.

Application denied.

64 Cal. 388

BARSTOW

v.

SAVAGE MINING Co. and others.

Filed December 26, 1883.

Where stock of an incorporation stands on the books in the name of A., and the stock is owned by B., and the certificate, though properly indorsed, is stolen from B. without his fault, the thief can pass no title to a purchaser in the ordinary course of business, for value, without notice of any defect in the vendor's title, and B. may pursue and recover his property.

Winter v. Belmont Mining Co. 53 Cal. 428, distinguished.

Certificates of stock are not securities for money in any sense; much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation.

In Bank.

Columbus Bartlett and Claude L. Smith, for appellant.

G. W. Gordon, James A. Waymire, and Lloyd, Newlands & Wood, for respondents.

MYRICK, J. The facts of this case, as presented in the findings, are substantially as follows:

Prior to February 5, 1879, the defendant the Savage Mining Company duly issued its three certificates of stock—No. 24 843, certifying that C. A. Schmitt, trustee, is entitled to 30 shares of the capital stock of said company, transferable on the books of the company by indorsement on and surrender of the certificate; No. 25,537 in the name of Randolph, Macintosh & Co., trustees, for 10 shares; and No. 25,704 in the name of Greenbaum, Helbing & Co., trustees, for 10 shares, in like tenor as the first. On the fifth of February, 1879, the plaintiff purchased from the owners thereof, for value paid, the said 50 shares, and received the said certificates properly indorsed. Thereafter, on or about May 1, 1879, the said certificates were, without any fault or negligence of the plaintiff, stolen from him, and were

on the sixth of May, 1879, sold and delivered by the thief to the defendant Rogers, he (Rogers) purchasing the same in the usual course of business, for value, without notice of any defect in his vendor's title. The plaintiff never sold the certificates, or the stock which they represent, or authorized or acquiesced in or ratified such sale. On the thirtieth of May, 1879, plaintiff demanded of the defendant Rogers the return of the certificates, and Rogers refused to deliver them. The intervenor, Kutz, purchased the certificate for 30 shares (subsequently to the theft) in the ordinary course of business, for value, without notice of any defect in his vendor's title, and whatever title he (Kutz) has, he derived from Rogers. None of said 50 shares have been transferred on the books of the company from the names of the parties set forth in said certificates, except the 10 shares represented by certificate No. 25,537, which have been sold for assessments. After the theft the plaintiff duly demanded of the company a transfer of said 50 shares from the names in which they stand, as aforesaid, to his own name, and the issuance to him of a certificate therefor, and such transfer and issuance were refused. On the eleventh of August, 1879, the intervenor presented certificate No. 24,843 to the company, offered to pay any assessment levied on the stock represented thereby, and demanded a transfer to himself of the 30 shares and the issuance to him of a new certificate, which transfer and issuance were refused on the ground that the company had already been notified by plaintiff of his ownership of the stock and of the theft, and had been directed to stop transfer thereof, and had been, in connection with Rogers, sued by plaintiff concerning the ownership of the stock. The court then found as to the value of the stock at different times involved in the transactions. From these facts the court below concluded as law that the intervenor, Kutz, was entitled to judgment against the plaintiff and the company for his costs, and against the company for \$460 damages, and that the defendant, Rogers, was entitled to judgment against the plaintiff for his costs, and rendered judgment accordingly. From this judgment the plaintiff appealed.

It will be seen from the foregoing that the question for consideration is, if shares of stock of a corporation standing in the name of A. on the books of the corporation be owned by B., the certificate being properly indorsed, and if the certificate be stolen without the fault or negligence of B., does the purchaser from the thief take title so as to prevent B. from claiming the property?

1. It is well known to be the general rule that a thief acquires no title to the stolen property, and that he can pass none. "The mere possession of chattels, by whatever means acquired, if there be no other evidence of property or authority to sell from the true owner, will not enable the possessor to give a good title." *Covill v. Hill*, 4 Denio, 323. To the general rule above stated there are exceptions as to money and negotiable securities.

2. A negotiable instrument is defined to be "a written promise or request for the payment of a certain sum of money to order or bearer." Section 3087, Civil Code. There are six classes of negotiable instruments, namely: (1) Bills of exchange; (2) promissory notes; (3) bank notes; (4) checks; (5) bonds; (6) certificates of deposit. Section 3095, Civil Code.

A certificate of stock, namely, that A. is the owner of shares of stock in an incorporated company, is not a promise or request for the payment of money, nor does it contain any of the elements of such promise or request. "A negotiable instrument *must not contain* any other contract than such as is specified in this article." Section 3093, Civil Code.

"The distinction between all these [notes, bills, corporation bonds] and corporate stocks is marked and striking. Certificates of stock are not securities for money in any sense; much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation." *Mechanics' Bank v. N. Y. & N. H. R. Co.* 13 N. Y. 627; *Sherwood v. Meadow Valley Mining Co.* 50 Cal. 412.

The case last above cited (*Sherwood v. Meadow Valley Mining Co.*) was an action based on the following facts: One Schmeidell was the owner of 20 shares of the stock of the defendant, and held a certificate therefor issued to himself as trustee, and he sold the shares and delivered the certificate, properly indorsed, to Levy, who lost the same, not having had the stock transferred on the books of the corporation. The plaintiff purchased (as he supposed) the stock, and received delivery of the certificate for value, in the usual course of his business as a stock-broker. It was held that the plaintiff acquired no right to the stock.

In the subsequent case of *Winter v. Belmont Mining Co.* 53 Cal. 428, the facts were that Winter was the owner of certain shares of stock, and had them transferred on the books of the company to the name of "M., trustee," who indorsed the certificates in blank, and delivered them to Winter. Subsequently M. stole the certificates from Winter, and sold them in the market in the ordinary course of business. The court, in commenting on the statute providing that shares of stock may be transferred by indorsement and delivery of the certificate, but that the transfer is not valid, except as between the parties, until entered on the books of the corporation; and on certain prior cases holding that until such entry the stock may be sold on execution against the person in whose name the stock stood,—applied that principle to the case before it of stolen certificates, and held that the purchaser from M., the thief, took a good title. We are not prepared to follow that case (*Winter v. Belmont Mining Co.*) in what is said in the opinion regarding the negotiability of certificates of stock; but, on the contrary, are of opinion that the principle that the thief of the stolen property (it not being money or negotiable se-

curities) can pass no title, should be maintained, unless the facts presented by a case should bring it within the law as stated in *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325: "When the owner of property confers upon another an apparent title to or power of disposition over it, he is estopped from asserting his title as against an innocent third party who has dealt with the apparent owner in reference thereto without knowledge of the claims of the true owner."

Upon referring to the transcript in *Winter v. Belmont Mining Co.* we observe the findings of the court state that Winter delivered his certificates to M. with permission that the latter have the shares of stock transferred on the books and certificates issued to him, (M.), *for the purpose of enabling the said M. to vote at the then coming election as the owner of said stock.*" Here was an element upon which, perhaps, it might properly be held that Winter was estopped from saying, as to an innocent purchaser, the title did not pass; because, for one purpose, at least, viz., to vote, he had authorized M. to appear to be and act as the owner. But if the purchaser from one who has not the title, and has no authority to sell, relies for his protection on the negligence of the true owner, he must show that such negligence was the proximate cause of the deceit.

In the case at bar, the owner, Barstow, did not clothe the thief with any apparent power to pass title. The certificates, though properly indorsed, remained in the names of the former owners, and when Rogers purchased he was not dealing with any one who had apparent authority from the owner to make a disposition of the stock; he dealt with one having nothing beyond bare possession, which, as said above, does not clothe the possessor with the power of selling.

In conclusion, then, we are of opinion, and decide, that where stock of an incorporation stands on the books in the name of A. and the stock is owned by B., and the certificate, though properly indorsed, is stolen from B. without his fault, the thief can pass no title, and B. may pursue his property.

The judgment is reversed and the cause is remanded with instructions to render judgment in favor of plaintiff; but it is not manifest that the plaintiff can have judgment against Rogers for the value of the stock, and also that the incorporation issue new certificates to him; he may have one or the other, as he elects, but not both. It is stated in the findings that the shares represented by certificate No. 25,537 have been sold for assessments. Plaintiff being the owner of those shares, he should have paid the assessments, and neither Rogers nor the incorporation should be held responsible for his omission to do so.

We concur: SHARPSTEIN, J.; MCKINSTRY, J.; THORNTON, J.; MORRISON, C. J.

Ross, J. I concur in the judgment.

64 Cal. 337

SMITH
v.
TAYLOR.

Filed December 26, 1883.

A sheriff may release attached property, by direction of the attaching creditor or his attorneys, without an order of the court.

In Bank.

Craig & Meredith, for respondent.

C. H. Parker, for appellant.

SHARPSTEIN, J. The finding "that the plaintiff did not at any time release, or cause to be released, from attachment property of the defendant Robinson," is not justified by the evidence, which shows "that real property sufficient in value of the defendant Robinson had been duly attached to satisfy any judgment which might be obtained in said action against said Robinson and Taylor;" and that the sheriff was directed, by the attorneys of the plaintiff, to release said property of said defendant Robinson from said attachment.

The claim of respondent's counsel, that real property attached as this can only be released by order of the court, is not, in our opinion, tenable. The Code provides for a discharge of a writ of attachment by order of the court, on motion of the defendant, on the ground that the same was improperly or irregularly issued. But there is nothing to indicate an intention to preclude an attaching creditor from voluntarily releasing property attached, or that such a release would not be valid until it received the sanction of the court. And we know of no way in which the plaintiff could have made a release more effectual than by directing the sheriff to release the property described from the attachment. The cases which hold that the sheriff could not do this without the order of the court, or the consent or direction of the plaintiff, have no application to this case.

Judgment and order reversed.

We concur: MCKINSTRY, J.; THORNTON, J.; MORRISON, C. J.; MYRICK, J.; MCKEE, J.

v.1.no.3—23

64 Cal. 383

MORROW

v.

SUPERIOR COURT.

Filed December 26, 1883.

Before the adoption of the present constitution one having a claim against a life insurance company, incorporated under the act of April 22, 1866, could bring and maintain an action in a justice's court against a stockholder in such corporation whose proportionate share of such liability would be less than \$300.

In an action under the statute making the individual stockholder liable for such proportion of the indebtedness of the corporation to the creditor as the stock of such stockholder bears to the whole capital stock of the corporation, it will only be necessary to ascertain the whole amount of the capital stock of such company, the amount owned by the stockholder sued, and the amount of the indebtedness of the company to the creditor suing; and this can be done as well in an action at law as in equity.

In Bank.

E. W. McGraw, for petitioner.

SHARPSTEIN, J. The principal question in this case is whether, before the adoption of the present constitution, one having a claim against a life insurance company, incorporated under the act of April 22, 1866, (St. 1865-66. p. 752,) could bring and maintain in justice's court an action against a stockholder in such incorporation, whose proportionate share of such liability would be less than \$300. Whether he could or not depends very much on the construction to be given to section 17 of said act, which is as follows: "Each stockholder of the company shall be individually and personally liable for such proportion of all its debts and liabilities as the amount of its capital stock owned by him bears to the whole of the capital stock."

In the brief of counsel for petitioner it is said that "in any action to enforce this liability it is necessary that there should be ascertained and determined (1) the amount of capital stock of the corporation; (2) the amount of this capital stock owned by each stockholder; (3) the total amount of debts and liabilities of the corporation; (4) the proportion of such debts and liabilities for which each stockholder is liable." And it is further said that "this cannot be done in a common-law action."

But if an individual creditor can maintain an action against an individual stockholder for such proportion of the indebtedness of the company to such creditor as the stock of such stockholder bears to the whole of the capital stock of such company, it would only be necessary in such action to ascertain the whole amount of the capital stock of such company, the amount owned by the stockholder sued, and the amount of the indebtedness of the company to the creditor suing such stockholder. This could be done quite as well at law as in equity.

The first clause of section 16 of the act of April 14, 1853, as amended by the act of April 27, 1863, read as follows: "Each stockholder shall be individually and personally liable for his proportion of all the debts and liabilities of the company contracted or incurred during the time that he was a stockholder, for the recovery of which joint or several actions may be prosecuted."

In *Larrabee v. Baldwin*, 35 Cal. 155, it was said it would not be a strained construction of that clause, standing alone, to hold that a creditor of the company might maintain an action against an individual stockholder on his personal liability, although it "might be open to some doubt whether it was contemplated that each creditor should be compelled to pursue each stockholder for his individual share of his debt, or whether he might make his money out of the first one he could find whose liability is sufficient to cover the indebtedness." But, after throwing out this intimation, the court decided the case before it; mainly, if not wholly, on other provisions of the same section.

In the clause last above quoted it is expressly provided that "joint or several actions may be prosecuted" on the stockholder's liability. That provision is not contained in the clause under which the petitioner was sued. But it is expressly provided that each stockholder shall be *individually and personally* liable for a proportion of all the debts, and he is necessarily liable for the same proportion of each debt. *All the debts* means *every* debt of the company; and it does seem to us that any creditor is entitled to sue any stockholder for such proportion of the indebtedness of the company to such creditor as the stock of such stockholder bears to the whole capital stock of said company. The stockholder is made *individually, not jointly*, liable. And if it should be the misfortune of any stockholder to be sued by each creditor of the company, the aggregate of their several recoveries could not exceed the sum which all might recover in a joint action.

As to the primary liability of the stockholders of the company for its debts we entertain no doubt. There is a provision for a guaranty fund, to which recourse may be had after the assets from premiums and other sources, exclusive of capital stock, have been exhausted. But, as we construe it, there is nothing in the act which postpones a creditor's right of action against a stockholder until after he has exhausted his remedies, or any part of them, against the company, for the recovery of his debt. The liability of the stockholder is, in our opinion, as distinct and separate from that of the corporation as it would be if the act had made no provision for any other liability than that of stockholders for the debts of the company.

Judgment affirmed.

We concur: THORNTON, J.; MYRICK, J.; MORRISON, C. J.

SUPREME COURT OF CALIFORNIA.

2 Cal. Unrep. 228

CALIFORNIA INS. CO.

v.

SCHINDLER and others.

Filed December 27, 1883.

In an injunction suit an undertaking was given for a temporary restraining order, valid to a certain date. On that date another undertaking was filed for a continuance of the injunction, with different sureties. *Held*, on a suit against the second sureties, that under the recitals the second undertaking was not given in place of the first one, and that the sureties sued were not liable for the damages caused during the time covered by the first undertaking.

In Bank.

Pillsbury & Titus, for plaintiff.

Fox & Kellogg, for defendants and appellants.

McKEE, J. The action in hand was brought against defendants, as sureties to an undertaking in the sum of \$2,500, to recover damages which the corporation, plaintiff in the action, claims to have sustained by reason of, and during the continuance of, a restraining order, and the costs and expenses incurred in procuring its dissolution. The restraining order was made on March 15, 1879, in an action commenced on that day by George W. Carter against the said corporation to perpetually enjoin it from collecting an assessment which had been levied upon its outstanding policies of insurance. At the time of filing the complaint in the action Carter obtained an order to show cause why a temporary injunction should not be issued, and also an order *ad interim* restraining the corporation from doing any act or thing in the way of collecting the assessment. On obtaining this last order he gave bond, as required by the court, in the sum of \$1,000, conditioned according to section 525 of the Code of Civil Procedure. That bond was filed and approved by the court on March 15, 1879.

The order to show cause came on to be heard April 11, 1879. On that day counsel for both parties argued and submitted Carter's application for a temporary injunction. The court took the application under advisement, and, at the same time, required Carter to give and file a further undertaking in the sum of \$2,500, with the like conditions and provisions contained in the \$1,000 bond, "as a condition to the further continuance of the injunction." This additional bond was given, approved, and filed on the day of the entry of the order which required it. Three days thereafter, namely, on April 14,

1879, the court dismissed the order to show cause, denied the application for a writ of injunction on the ground that the plaintiff in the action was not entitled to the writ, and discharged the restraining order on the ground that it had been improperly made. From that order no appeal has been taken; the order has not been in any respect modified or reversed; it stands in full force, although the injunction suit is yet pending.

At the trial of the action upon the breach of the \$2,500 undertaking the court found as follows, namely:

"(1) That the district court ordered that the undertaking for \$2,500 be given and filed in the place and stead of the bond already filed, to-wit, the aforesaid bond of \$1,000; and that in pursuance of the order thus made the undertaking was given, approved, and filed in the place and stead of the bond for \$1,000.

"(2) That, in order to procure the dissolution and discharge of the restraining order, the corporation employed and paid to counsel for professional services in that matter the sum of \$500; and that it has also sustained damages in the sum of \$605, in consequence of being prevented and hindered by the restraining order from carrying on business for 30 days, during which time it had to pay that sum of money for office rent, salaries of officers and employes, and office expenses and the like."

The first finding is directly opposed to the averment in the complaint upon the subject to which it relates, and to the recitals in the undertaking upon which the action is founded. The averments of the complaint are that the court made an order that the undertaking be given "as a condition to the further continuance of the said injunction," and that "the undertaking was given under and in pursuance of said order." And the recitals in the undertaking are:

"Whereas, the above-named plaintiff has commenced an action in the district court of the twelfth judicial district of the state of California, in and for the city and county of San Francisco, against the above-mentioned defendant, and is about to apply for an injunction in said action against the said defendant, enjoining and restraining the said defendant, its officers, directors, and servants, from the commission of certain acts as in the complaint filed in said action is more particularly set forth and described:

"Now, therefore, we, the undersigned, David Schindler and N. Wyckoff, in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake, in the sum of two thousand five hundred dollars, gold coin of the United States, and promise to the effect that in case said injunction shall issue the said plaintiff will pay to the said parties enjoined such damages, not exceeding the sum of two thousand five hundred dollars, gold coin of the United States, as such parties may sustain by reason of said injunction, if the said district court finally decide that the said plaintiff was not entitled thereto.

"Dated this eleventh day of April, A. D. 1879."

In the presence of the fact admitted by the complaint and recited in the undertaking, (which is also made part of the complaint,) that the undertaking was given as a condition to the further continuance of the injunction, there is no place for presumption or proof that it was given in the place or stead of a former undertaking in the case; and the finding, being contrary to the averments of the complaint, is outside the case made by the plaintiff, and renders the decision of the court erroneous for defective findings. *Murdock v. Clark*, 9 Pac. C. Law J. 207; *Silvey v. Neary*, 59 Cal. 97; *Tracy v. Craig*, 55 Cal. 91; *Hill v. Den*, 54 Cal. 20.

The second finding is also outside the limits of the cause of action arising out of a breach of the undertaking. It includes damages for which defendants, as sureties to the undertaking, are not legally bound. For whether the undertaking was given as a condition for further continuing the restraining order, as is alleged in plaintiff's statement of its cause of action, or in the place or stead of the first bond for \$1,000, given when the restraining order was made, as it has been found by the court, the sureties to the undertaking bound themselves only prospectively from the day of the execution of their undertaking, and not retrospectively; they were, therefore, not liable on a breach of their undertaking for damages which the obligee may have sustained before the date of their obligation. It is too well settled to need reference to authority that the obligation of sureties arises out of the terms of their contract, and can never arise from implication or inference. To the extent, and in the manner, and under the circumstances expressed by those terms, they are bound, but no further.

Now, by the express terms of the undertaking in suit, defendants promised to pay such damages as might be sustained by reason of the injunction, if the court shall finally decide plaintiff was not finally entitled thereto. Undoubtedly the "injunction," in the minds of the contracting parties, was the *ad interim* order, by which the corporation was enjoined from doing the acts and things complained of, until the application for a temporary injunction was heard and decided. That order was made and had been operative, upon the \$1,000 bond, from March 15, 1879, until April 11, 1879. On that day the defendants contracted for its further continuance. Then, and not until then, the obligation arising out of their contract commenced; and it continued from that time onward until the happening of the contingency which caused a breach of the obligation, upon which they became liable for any damages which may have been sustained during the existence of their obligation, but not for damages suffered anterior to its date. For such damages a bond had been already given, upon which other persons were liable. It may be that those who were sureties to that first bond had become insolvent, or that its penalty was insufficient, and that on these grounds the court required the giving of the additional undertaking as a condition "to a further continuance of the restraining order;" but in either case the sureties to

the first bond would be bound for the damages caused by the order before the giving of the second bond; and, at all events, the sureties to the second could not be made liable therefor until the remedy on the first bond had been exhausted. *Lane v. State*, 24 Ind. 421; *Bates v. State*, 15 Ind. 322.

Whence, it results that the court below erred in deciding upon the findings that the defendants were liable upon their undertaking for damages suffered by the plaintiff, by reason of the restraining order, before the date of their obligation.

Judgment reversed, and cause remanded for further proceedings.

MYRICK, J.: I concur in the judgment.

CONCURRING OPINION.

We concur in the reversal of the judgment on the ground that the action was prematurely brought. *Clark v. Clayton*, 10 Pac. L. J. 344; *Dougherty v. Dore*, 11 Pac. L. J. 76.

SHARPSTEIN, J.

MORRISON, C. J.

THORNTON, J.

64 Cal. 394

BRANGON

v.

HIS CREDITORS.

Filed December 27, 1883.

A creditor may file his opposition to the discharge of a debtor, and may withdraw the same, without the consent of the other creditors.

Ross, J., dissents.

In Bank.

J. R. Brandon, for plaintiff.

E. J. Hutchinson and David Lyon, for defendant and appellant.

MYRICK, J. We are of opinion that each creditor may file his opposition to the discharge of the debtor, and may control the same to the extent of withdrawing, whether other creditors consent thereto or not.

Judgment affirmed.

We concur: MORRISON, C. J.; THORNTON, J.; SHARPSTEIN, J.

Ross, J., *dissenting*. This was a proceeding in insolvency under the insolvent act of 1852. Within statutory time, under the provisions of section 20 of the act, Henry Cowell, a dissenting creditor of the insolvent, who had proved up his claim, filed a written opposition to the discharge of the insolvent, grounded on fraud. The accusation was answered by the insolvent, but before any trial was had of the issues raised by the answer, the attorneys for the insolvent and the opposing creditor stipulated to withdraw the opposition and answer, and to allow the proceedings in insolvency to go on as if no opposition had been filed. To that, however, the appellant, who was also a schedule creditor of the insolvent, and had proved and filed his claim, objected, upon the ground, as stated in his affidavit, "that the stipulation was fraudulently, collusively, and corruptly entered into by and between said Cowell and said Brangon, whereby, in consideration of the sum of \$2,500, then paid or secured to be paid by said Brangon, and at the request of said Brangon the said Cowell agreed and promised to withdraw and dismiss the said opposition theretofore filed by him in the matter above entitled." Upon this affidavit the appellant asked leave to intervene and prosecute the opposition proceeding, offering, at the same time, to substantiate by proof the charges which he had made in the affidavit as to the collusion and fraud by which the stipulation had been made, and the offer was met by the insolvent's attorney, who stated "his readiness to prove, by witnesses then present, that such charges of collusion and fraud on the part of Cowell and the insolvent were utterly false and untrue." But the court refused to hear the affirmations and denials of fraud in procuring the stipulation, denied the application of the appellant to intervene, dismissed the opposition, and afterwards discharged the insolvent debtor from his debts and liabilities.

By section 20 of the act of 1852 provision is made by which any one or more of the creditors may, within 10 days next following the appointment of an assignee, contest the proceedings on the ground of fraud, by filing a written opposition stating specifically the acts of fraud charged, whereupon, and upon receiving the insolvent's answer thereto, a jury is required to be summoned to try the issue, which, if established, forever deprives the insolvent of the benefit of the act. But because each and every creditor is by the act entitled to file a written opposition to the proceedings within 10 days next following the appointment of an assignee, I do not think each and every one is necessarily bound to do so in order to protect his right. "A creditor intending to oppose the discharge," as said in *Re Houghton*, 10 N. B. R. 339, "may find that this duty has been assumed by another creditor; he examines the specifications and considers them sufficient; perhaps he consults with that creditor and finds him determined to prosecute the case. Suddenly he learns that the opposition is to be waived"—and this pursuant to an alleged fraudulent and collusive arrangement between the insolvent debtor and the opposing creditor,

and after the statutory time for the filing of another opposition has passed. Can such a practice be tolerated? Is the court powerless to prevent itself from being made the instrument for carrying into effect the arrangement of such a nature? I think not. Good faith on the part of the insolvent in making the assignment is by the statute made prerequisite to his right to a discharge. When written charges of fraud in making the assignment are duly filed, the insolvent debtor is required to answer them; and if he denies them, they are to be disposed of in accordance with law. The statute provides that the court must thereupon summon a jury to try them. No doubt the charges may, by the consent of *all* parties in interest, and by the permission of the court, be withdrawn. But, of course, the court ought not, and would not, permit such withdrawal if there was reason to believe the charges were true. But who are the parties in interest? Are they the insolvent debtor and the opposing creditor only? I think not. When the petitioner is adjudged insolvent, all his creditors become parties in the proceedings and interested therein. The petitioner cannot retrace his steps and cause his petition to be dismissed unless by the consent of all of his creditors; and this because each and every creditor is directly interested. *Cerf v. Oaks*, 59 Cal. 135; *Bump, Bankr.* 20. So, too, when one creditor files an opposition to the proceedings, charging fraud on the part of the insolvent, every other creditor is interested in the charge, for its disposition is bound to affect his rights. Every creditor has a right to rely upon the charge being prosecuted in good faith; and if the creditor who files it fails so to prosecute it, I think any other creditor entitled to assume the burden.

The judgment should be reversed.

McKEE, J.: I concur.

64 Cal. 397

SCHULER

v.

SAVINGS & LOAN Soc. and others.

Filed December 27, 1883.

In the absence of evidence as to whether certain property belongs separately to the husband or wife, or to them jointly, the presumption is that it is community property.

A wife may contract with her husband as a *feme sole*, and if she parts with her interest in the homestead for a consideration in money, she may hold such money as her separate property.

In Bank.

M. C. Hassett, for respondents and plaintiffs.

Geo. W. Tyler, for appellant.

MCKEE, J. The appellant, Henry Schuler, was the owner of a brewery in Sonora, in this state, and he and his wife, the respondent herein, resided in two of the rooms of the brewery building. On or about September 1, 1874, the husband contracted to sell the property for \$3,000,—\$1,000 payable "in hand," another \$1,000 on or before the first of October next thereafter, and the remaining \$1,000 on or before the first of November following. The wife, *having heard of the sale*, made and recorded a declaration of homestead upon the property on the eighteenth of September, 1874, and when the time came for the husband to perform his contract, she refused to join in the execution of the deed unless he would secure her for her interest in the homestead claim. There was no evidence whether the property, before the making and filing of the declaration of homestead, was the separate property of the husband or community property. In the absence of such evidence, the presumption is that it was community property, (*Althof v. Conheim*, 58 Cal. 230;) and when the declaration of homestead was made and recorded by the wife, the property became, by operation of law, the estate in joint tenancy of the husband and wife, (section 1365, Civil Code 1874,) of which they were jointly seized in equal shares. It was therefore not part of their community property. Recognizing the existence of the legal relation between himself and wife in respect to the property, the husband consented to secure her for her interest or estate in the homestead premises, and for that purpose he executed to her a transfer of a bank-book which he had with the Savings & Loan Society of San Francisco, which showed on deposit in the bank a balance in his favor of about \$2,700. The transfer was in the following words:

"SONORA, October 22, 1874.

"*Savings & Loan Society, 619 Clay street:*

"Transfer to Rose C. Schuler the balance of my account.

"HENRY SCHULER.

"Witness: D. REDMOND."

This transfer the husband delivered, with the bank-book, to his wife, upon the receipt of which she abandoned the homestead by joining in the execution and delivery of the deed of the property to the purchaser. It is admitted by counsel for appellant that the transfer and delivery of the bank-book were made to the wife in consideration of her joining in the execution of the deed. The transfer was therefore valid and effectual to vest title in the wife, if she had the legal capacity to contract with her husband concerning her joint real property. Section 158 of the Civil Code has provided that "either

husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might, if unmarried," etc.

Under this law husband and wife are not one in respect to the separate, joint, or common property which may have been acquired by either; they are co-equals, and each is allowed to contract with the other in regard to such property as either might contract with a stranger. The rights of either in respect to such property are substantially equivalent, differing chiefly in the single circumstance that the husband, being still considered the head of the family, is entitled to manage and control the property of the wife for the benefit of both, and to dispose of the common property, except for the purpose of defrauding the wife of her rights therein. The transaction between the husband and wife, relating as it did to real property of which they were joint owners, was therefore one in which they could engage with each other.

But it is urged that while the wife, by the transfer, acquired the right to the money, she acquired it "as common property, and not absolutely, and for her sole and separate use." Yet the transaction was made between the parties as if they were unmarried. Sections 158, 159, *supra*. The husband dealt with his wife as a *feme sole*, and in that capacity she dealt with him, and as such the transfer was made and the bank-book delivered to her. Having received them as a *feme sole*, she would seem to be entitled to the fruits of the transaction as her separate property.

But whether the money be regarded the separate property of the wife, or the common property of the husband and wife, we see no error in the record or judgment in the case prejudicial to the appellant. For, as shaped by the pleadings, the case involves an action to obtain the possession of money deposited in a bank by one whose title to it is admitted. If it was the separate property of the wife, her property and remedial rights to it are unquestionable. If it was common property neither her property right nor her capacity to sue has been questioned. By his answer the husband, while admitting the transaction between himself and wife, affirmatively averred that they intended thereby to vest it in her as common property, and that he had notified the bank not to pay the money to her because it was common property of himself and wife, while the bank by its answer averred its readiness to pay the money to whoever was lawfully entitled to it. The verdict was for the plaintiff, and judgment was entered in her favor, from which the bank has now appealed.

Even if the money be common property, the judgment does not affect the right of the husband. Nor would possession of the money by the wife affect his rights. Her possession of common property is his possession; and he cannot, any more than any other tenant in common, sue his co-tenant for the possession of the common prop-

erty or his interest therein, except in case of a conversion. That, according to the issues raised by his answer, is not this case.

There is no error in the instructions of the court to the jury, and there are no errors in the record prejudicial to the appellant.

Judgment and order affirmed.

We concur: MYRICK, J.; SHARPSTEIN, J.

McKINSTRY, J., *concurring*. We concur in the judgment. The point urged by the appellant is that the court below erred in giving the following instruction: "If you believe from the evidence that the defendant, Henry Schuler, had agreed to convey certain real estate in Sonora, on which plaintiff and said defendant resided at the time, to said Bacigalupi; that plaintiff filed a declaration of homestead declaring the same a homestead; and that, in consideration that plaintiff would execute with said defendant a deed of said real estate to said Bacigalupi, the said defendant made and delivered the instrument, Exhibit A, then you will find for the plaintiff."

Exhibit A speaks for itself, and, in our opinion, operated a transfer to plaintiff of the balance of the account in bank.

We concur: MORRISON, C. J.; THORNTON, J.

2 Cal. Unrep. 232

GUTIERREZ

v.

BRINKERHOFF.

Filed December 28, 1883:

A deed untainted by fraud is not impeachable for fraud committed afterwards in the obtaining of another deed between the same parties for different premises.

A motion for a new trial on the ground of insufficiency of evidence is addressed to the discretion of the court, and will not be reversed unless a manifest abuse of discretion is shown. The fact that there was a change in the incumbency of the bench between the trial and the determination of the motion for a new trial does not change the rule.

In Bank.

Irving, Benham & Packard, for plaintiff and appellant.

Winans & Belknap, for respondent and defendant.

McKEE, J. The case in hand arises out of an action which was brought by the plaintiff, as widow and sole devisee of Octaviano

Gutierrez, deceased, to obtain a decree annulling and setting aside certain documents affecting a tract of land in Santa Barbara county, known as the rancho La Laguna, upon the grounds that the same were obtained by fraud and without consideration. Upon a trial of the issues raised by the pleadings, decision and judgment were rendered in favor of the plaintiff. Within statutory time, defendants moved for a new trial upon a statement of the case, settled and certified by the judge who heard and decided the case, but, before the motion came on to be heard, his term of office ended, and the motion was argued and submitted upon the statement to his successor in office, who ordered the judgment vacated and the case to be retried. From that order the plaintiff has appealed; and it is contended that the judge of the court below not only abused his discretion in granting a new trial, but committed error prejudicial to the rights of the plaintiff.

The statement of the case, upon which the order was made, shows that Gutierrez claimed the Laguna ranch under two inchoate grants from the Mexican government, one of which was dated March 12, 1844, and the other November 13, 1845. The first was a provisional grant "for three leagues of land of the tract called La Laguna," and the second a grant of the same character for "the land described and set forth in the map accompanying the grant." When these grants were made and delivered, Gutierrez was a married man and the husband of the present plaintiff. He and his family continued to occupy the ranch after the acquisition of California by the United States, and in 1854 he presented his grant for confirmation to the United States board of land commissioners. Confirmation of his claim to the extent of three square leagues of land was made by the board. But the case was afterwards taken into the United States district court for the Eighth district of California, where a decree of confirmation was obtained as follows: "To the extent of eleven square leagues within the boundaries called for in the grant, and described in the map accompanying it, provided that should there be a less quantity than eleven square leagues contained within said boundaries, then confirmation is hereby made to such less quantity." That confirmation became final, and under the decree the United States surveyor general for California, in October, 1860, caused a survey of the ranch to be made, which included four leagues of land. The plot of this survey was returned and filed in the surveyor general's office at San Francisco. In December, 1860, that officer indorsed upon it his final approval, and for making the survey and the work appertaining to it he was paid by the United States government, in March, 1861. But instead of forwarding the approved plot of the survey and the documents connected with it to the commissioner of the general land-office at Washington for final approval, they were permitted to remain in the office at San Francisco.

Gutierrez having been awarded four leagues of land where he ap-

plied only for three, was satisfied with the survey, and acquiesced in it for several years. But in the beginning of the year 1865 the surveys of surrounding ranches had uncovered a large area of public land from which it became possible to obtain an extension of seven leagues in addition to the four leagues which had been already awarded to him. In January, 1865, he had given the defendants Brinkerhoff and Scollan a lease and executory contract for the exploration of the ranch for oil. While working under that contract, Brinkerhoff satisfied himself, after a careful examination of the records of Gutierrez's claim, of the feasibility of obtaining an extension of the ranch, under the decree of confirmation, and a patent for 11 leagues; and he proposed to Gutierrez that he would, in consideration of two leagues of the extension, procure, at his own cost and expense, such an extension and patent. This was in March, 1865. Gutierrez accepted the proposition, and Brinkerhoff immediately commenced proceedings in the United States surveyor general's office in San Francisco to set aside the approved survey of December, 1860, and to obtain an order for a new survey of the ranch. Pending these proceedings, Gutierrez, in performance of his agreement, on June 14, 1865, executed and delivered to Brinkerhoff and Scollan a deed, reciting a consideration of \$10, for two leagues of the ranch outside the four leagues; and, afterwards, in December, 1865, Brinkerhoff obtained a conveyance of the remaining five leagues outside the four leagues by a deed which recited a consideration of \$1,500. By these deeds Brinkerhoff acquired the title to about 30,000 acres of land for the consideration of \$1,510.

It is charged that at the times of the transactions which resulted in the transfer of the title to these seven leagues of the ranch, the owner, Gutierrez, was an unsuspicious old man, feeble in mind and body, ignorant of the English language, and unacquainted with business transactions; that Brinkerhoff was his family physician, friend, and confidential adviser, to whom had been intrusted the management and control of the proceedings relative to the ranch; that he abused this confidence by using it to cheat and defraud Gutierrez out of his title to the ranch; and that, in the execution of this design, he procured the deeds and other documents in connection with them to be executed and delivered to him by false promises, and without consideration, and by false and fraudulent representations of the nature and contents of the documents and of the uses to which Brinkerhoff intended, with the assistance of Scollan, to apply to them.

Brinkerhoff was a practicing physician; and, at least, about the time of the execution and delivery of the last deed was the family physician of Gutierrez, and continued to act as such until the time of the death of Gutierrez. In November, 1863, he had succeeded in obtaining an order from the surveyor general's office for a new survey of the ranch, and, while he was engaged in that proceeding, he also acted as agent and attorney in fact for Gutierrez, under two powers of attor-

ney, one of which was executed in October, 1865, empowering him to sell and convey the five leagues of the extension of the ranch, and the other on November 29, 1865, empowering him to sell and convey his entire interest in the ranch, including the four leagues. At the time of these transactions and of the execution of the deed of the twenty-ninth of December, 1865, Gutierrez was in "embarrassed circumstances," "harrassed for money," and in debt to Brinkerhoff for borrowed money, for which the latter held his promissory notes bearing interest at $1\frac{1}{2}$ per cent. per month. Under these circumstances Brinkerhoff procured the deed of December 29th.

The court found that Gutierrez was deceived by Brinkerhoff into the execution and delivery of both deeds; that Brinkerhoff induced him to execute and deliver the deed of the fourteenth of June by willful, false, and fraudulent representations "that his business relative to said ranch would be facilitated;" and under these representations the deed was executed and delivered without any consideration being paid, or intended to be paid; that Brinkerhoff, after obtaining the title to the two leagues, and while he was acting as the agent of Gutierrez, entered into certain secret and corrupt arrangements with some of the officers in and connected with the surveyor general's office in San Francisco for procuring the extension of the ranch and a patent for 11 leagues, to carry out which he, regardless of his duty of physician, friend, and confidential adviser, by false and fraudulent representations procured the execution and delivery of the deed of the twenty-ninth of December for a grossly inadequate consideration, which was never paid.

The finding as to the non-payment of the consideration of the last deed is contrary to the evidence. And whatever there may be arising out of the fact of inadequacy of consideration, and out of the legal relations of principal and agent, of debtor and creditor, and of the other relations of confidence existing between the parties at the time of obtaining that deed, from which fraud in fact might be inferred, there is nothing in the statement of the case tending to show the existence of such legal relations between them at the time of the arrangement for obtaining an extension of the grant, or that the deed of June 14th, executed in consummation of that arrangement, was procured by fraud in fact.

In the absence of actual or constructive fraud the arrangement was valid and binding. Both parties deliberately entered into it; the one agreeing to pay all the expenses and furnish the skill and labor necessary to carry on the proceedings for obtaining the extension and patent, and the other to convey two leagues of the seven leagues of land which would be obtained from the government. In no respect was Gutierrez deceived in entering into the contract. He knew exactly its terms, and its scope and object; and after the proceedings had been commenced for the attainment of that object, he performed his part of the contract by the execution and delivery of the deed.

There was not a single circumstance adduced by the plaintiff to show that that deed was tainted with fraud. The evidence that it was executed and delivered in good faith, and for a valuable consideration rendered, appears to be all one way, and its validity could not be affected or changed by any subsequent conduct of Brinkerhoff in obtaining the deed of December 29th, even if the circumstances under which that deed was obtained tainted it with fraud. A deed untainted by fraud is not impeachable for fraud committed afterwards in the obtaining of another deed, for different premises, by the same grantee from the same grantor.

There is no pretense that the original arrangement for the obtaining of an extension of the ranch and a patent for 11 leagues, under the decree of confirmation, was intended, by the parties to it, to swindle and defraud the government out of its public lands, or that the grantees, in performance of the arrangement, procured the deed for that purpose; and even if that were so, it is difficult to see how Gutierrez, as a party to it, could invoke out of such a transaction an enforceable cause of action against his alleged partners in fraud. *Depuy v. Williams*, 26 Cal. 309; *Gregory v. Haworth*, 25 Cal. 653; *Davis v. Mitchell*, 34 Cal. 90.

Order affirmed.

We concur: SHARPSTEIN, J.; MYRICK, J.

McKINSTRY, J., *concurring*. I concur in the judgment. The transcript shows a substantial conflict in the evidence bearing upon several of the issues and findings. It has frequently been held here that a motion for a new trial on the ground of the insufficiency of the evidence is addressed to the sound legal discretion of the court below, and that an order granting a new trial on that ground will not be reversed unless it appears there has been a manifest abuse of discretion. *Pierce v. Schaden*, 55 Cal. 406; *Bronner v. Wetzler*, Id. 419; *Phelps v. Union C. M. Co.* 39 Cal. 410; *Hall v. Banning*, 33 Cal. 521. Such manifest abuse of discretion does not appear.

The circumstance that there was a change in the incumbency of the bench, intermediate the trial and the determination of the motion for a new trial, makes no difference in the application of the rule. *Altschul v. Doyle*, 48 Cal. 535; *Macy v. Davila*, Id. 646; *Blum v. Sunol*, 11 Pac. C. Law J. 275.

64 Cal. 405

PRESTON

v.

HOOD.

Filed December 29, 1883.

The giving of the undertaking under section 540, Code Civil Proc., not only prevents the sheriff from making any further levy, but releases what he has already attached, and substitutes the security of the undertaking for the property which has been, or is about to be, attached.

The parties on the undertaking are sureties, and not original obligors; but a stay of execution for 60 days, by consent of counsel, does not operate to discharge them from their liability.

In Bank.

Van Dyke & Powell, for plaintiff and respondent.

A. D. Spivale and C. J. & J. H. Moore, for defendant and appellant.

MYRICK, J. This is an action on an undertaking given under section 540, Code Civil Proc., the defendants being the sureties. Two questions are presented for consideration:

1. The complaint avers the issuance of the attachment, and that the sheriff proceeded to execute the writ, and that the defendant in the action, to prevent the levy, gave the undertaking herein sued on; that upon the delivery of the undertaking the sheriff released the property attached, and returned the writ and undertaking. The undertaking recites the issuance of the writ, whereby the sheriff was commanded to attach and safely keep the property of the defendant therein named, unless he give security by undertaking in an amount sufficient to satisfy the demand, and states that, "whereas, the said defendant is desirous of giving the undertaking mentioned in the said writ, now, therefore," etc., "in consideration of the premises, and to prevent the levy of said attachment," etc. The court found that the sheriff, upon receiving the writ, proceeded to execute it, and levied upon some property belonging to the defendant named therein, and that upon the giving of the undertaking the sheriff did not attach any further property, and released what property he had levied upon, and returned the writ with the undertaking.

The defendants herein contend that their undertaking was to prevent a levy, not for the release of a levy, and that as property of sufficient value to pay the demand had been seized before the giving of the undertaking, there is no liability on their part.

There are in the Code of Civil Procedure two distinct provisions for undertakings in attachment proceedings: (1) That in section 540, by which the undertaking is delivered to the sheriff, and the parties

deal directly with him, and (2) that in section 554, where the court is to order the discharge, after the defendant has appeared. This case is under section 540. The undertaking refers to a writ authorized by that section, and recites, "whereas, the defendant is desirous of giving the undertaking mentioned in said writ," and the section distinctly states that the writ must require the sheriff [which the writ in this case did] to attach and safely keep the property of the defendant, unless an undertaking be given in an amount sufficient to satisfy the demand, or in an amount equal to the value of the property which has been or is about to be attached—in which case to take the undertaking. Here is a distinct recognition of the fact that the sheriff may have commenced the execution of the writ, and may have attached some property, before the delivery of the undertaking, (*Curiac v. Packard*, 29 Cal. 199, per SAWYER, J.,) and he is required to take the undertaking, and proceed no further. In the absence of an undertaking he is commanded not only to attach, but to *safely keep*; the giving of the undertaking not only prevents him from making any further levy, but it prevents him from keeping any property already attached, and releases any levy already made, and substitutes the security of the undertaking in the place of property which *has been or is about to be attached*.

2. The plaintiffs offered in evidence the judgment roll in the attachment suit, showing the rendition of judgment in their favor. No extension of time appeared in the roll. The defendants offered in evidence the minutes of the court, stating that the cause came on regularly for trial, the attorneys for the respective parties being present, and that by consent of counsel, in open court, judgment was directed to be entered in favor of plaintiffs and against defendants. Then followed the sentence: "By consent of respective counsel, it is ordered that proceedings on execution be stayed for sixty days." The plaintiffs objected to the evidence on the ground that the judgment as appearing in the roll could not be changed or modified by the evidence offered. The minutes did not change or modify the judgment; it was competent for the defendants to prove, if they could, an agreement between the parties to that suit for an extension of time; and the evidence was offered for that purpose. The defendants in this action claim that such extension, being without their consent, released them from liability on the undertaking, they being sureties merely. That they are sureties and not original obligors is amply sustained, as well by section 540, Code Civil Proc., as by the opinion of this court in *Curiac v. Packard*, 29 Cal. 197.

There is no doubt as to the general proposition that if the obligee make a valid contract with the obligor, for a consideration, to extend the time for payment, such contract will discharge the sureties, if made without their consent. The question is, does this case come within the general proposition? Forbearance will not discharge the surety, nor will a direction to the sheriff to return an execution with-

out levy; but if a seizure of personal property has been had, a direction to release the property seized will operate as a discharge *pro tanto*.

In *Hulme v. Coles*, 2 Sim. 13, an action was commenced in June on a bond, and on the twenty-third of that month, without the privity of the surety, the obligee took from the obligor a *cognovit* for the amount of the debt, with a stipulation that no judgment should be entered up or execution issued until the first of August following; held, by the arrangement complained of, time was not given, but the remedy was accelerated.

So, in *Fletcher v. Gamble*, 3 Ala. 335, it was held that a confession of judgment by the principal debtor, and stay of execution by the creditor until the next term of court, was not such a giving day of payment as would exonerate the surety; the delays which the debtor may have by operation of law, even if by arrangement between the parties, is not giving time. See, also, *Suydam v. Vance*, 2 McLean, 99, to the same effect.

In *Baker v. McClure*, 2 Blackf. (Ind.) 14, it was held that the single fact of taking a judgment by confession, with stay of execution for six months, was not sufficient to discharge the surety, in the absence of proof that, with the judgment by confession and stay, the money could not have been collected as speedily as by the usual course of proceedings.

In the case before us the judgment was by consent. By consenting to the judgment the defendant practically waived any ground he might otherwise have had for motion for new trial and of appeal. We cannot say, nor did the defendants in this case attempt or offer to prove, that without the consent for the judgment it could or would have become final and conclusive (in the sense of not being reviewable) before the expiration of 60 days. It may have been that when this case was called for trial the plaintiffs were not ready, in consequence whereof a continuance might have been granted to a day beyond the 60 days, the time depending upon other business before the court, and the plaintiffs, rather than have such delay, were willing to grant the time named, taking their judgment then.

We have not noticed all the points presented, but the above is practically a disposition of them.

Judgment and order affirmed.

CONCURRING OPINION.

We concur. By the express terms of the undertaking the defendants in this action undertook to pay, on demand, any judgment which the attaching creditor might recover against the attachment debtor. In view of this we think the defendants cannot, as between themselves and the plaintiff, be considered in the light of mere sureties.

SHARPSTEIN, J.

MORRISON, C. J.

McKINSTRY, J.

(64 Cal. 401)

PEOPLE

v.

LEWIS.

Filed December 29, 1883.

A continuance should not be granted if it does not appear that the attendance of the absent witness could be procured in a reasonable time.

The defense of once in jeopardy is untenable under the settled law of this state. *People v. Stanley*, 47 Cal. 113.

In the instructions of the court the sections of the Code may be identified otherwise than by the numbers.

In Bank.

The Attorney General, for the People.

Hinley, Whipple & Oates and *J. F. Campbell*, for appellant.

THORNTON, J. In this action the defendant was indicted for grand larceny, and in the indictment was charged with a previous conviction of a like offense. The defendant was arraigned and pleaded "not guilty to the offense charged in the indictment."

The continuance was properly refused. It did not seem that the attendance of the alleged absent witness could have been procured in a reasonable time. *People v. Cleveland*, 49 Cal. 580; *Same v. Ah Yute*, 53 Cal. 613.

On the trial the defendant offered to plead guilty to the charge of previous conviction. The court denied the offer. It is urged that this was error. We cannot accord with this view. The 969th section of the Penal Code, specially relating to the arraignment when a previous conviction was charged, had been repealed before the arraignment was had. The arraignment was had in May, 1882, while the section was repealed in 1880. See *Desty*, Penal Code 1881, § 969. Under these circumstances the arraignment had to be made under the statute, as it was left unrepealed. Penal Code, § 1017. Under this section the defendant was properly arraigned, and on such arraignment he pleaded not guilty as charged. This we regard as a compliance with the statute. Having then regularly pleaded, the court was not bound afterwards, on the trial, to accept the plea of guilty to the previous conviction. It may be in its discretion to do so or not—not a discretion, however, to be arbitrarily exercised, but one in accordance with the principles of law and its analogies. If the court abused its discretion in so ruling, a reversal would follow, but we cannot see that it went beyond what the law permitted. Viewing the question as one addressed to the discretion of the court, it is the most favorable that can be taken for the defendant, and in that view

there is no error. We will add here that the answer of defendant, in section 1158, Penal Code, is the plea which he tenders on arraignment. See *People v. King*, 12 Pac. L. J. 322.

It is stated that the court, in charging the jury, read certain sections of the Penal Code, the number of which is not given, and therefore it is in error. The bill of exceptions states what occurred in the following words: "*The Court*. I will instruct you, gentlemen, in the language of the statute, [reads section—of Penal Code,] '*Larceny in other cases is petit larceny.*'" The words in italics are the words used in section 488 of the Penal Code. It does not appear that more than one section was read, and the language of one section is given in the charge. Does this disclose error? We cannot say that it does. It may be that the court read other sections, but this does not appear. Error must be deducible from the record. If it does not appear, it does not exist; and it must be recollected that all intendments are in favor of the correctness of the action of the court below.

It may be argued that the language used, "that larceny in other cases is petit larceny," shows that a section was read defining cases which were not petit larceny. Granting this to be so, it would also show that the other sections in relation to grand larceny were read, and this would identify them sufficiently to bring them within the rule of *People v. Mortier*, 58 Cal. 262. Sections of the Code may be identified otherwise than by the numbers. If it was stated that the sections in relation to grand larceny were read, this would identify them sufficiently, and, according to the rule in *People v. Mortier*, *supra*, there would be no error.

The defendant was charged in the indictment with stealing, on the twenty-ninth of December, 1881, a cow, the property of Robert Faran, William A. Boose, and Edward Clysdale. At the time the indictment was found (third of May, 1882) Boose had deceased. It is said the indictment should have alleged the ownership, and the proof should have followed the allegation. This is assigned as an error. The indictment alleged the ownership as of the date when the offense was committed. The ownership was properly alleged as the date mentioned, and the evidence established the allegation.

The defense of once in jeopardy is untenable under the settled law of this state. *People v. Stanley*, 47 Cal. 113.

The direction as to the form of the verdict was correct, and the evidence was sufficient to justify the verdict.

No error appearing in the record, the judgment and order are affirmed.

WE CONCUR: MORRISON, C. J.; MYRICK, J.; SHARPSTEIN, J.

Cal. Rep. 1-4 P.—3

64 Cal. 400

PFISTER

v.

SUPERIOR COURT OF SANTA CLARA Co.

Filed December 29, 1883.

There is no authority in a court to quash subpoenas issued by a notary to take depositions. Objection should be made to the reading of the depositions if the proceedings are irregular.

In Bank.

J. J. Burt, for petitioner.

By THE COURT. This is a proceeding by a writ of review to review an order of the court below quashing subpoenas. An action was pending in said court, and upon affidavit and notice the plaintiff therein was proceeding to have the depositions of witnesses taken before a notary public, when, upon the motion of the defendant therein, the court made an order quashing the subpoenas on the ground that the affidavit upon which they were issued was not sufficient. The subpoenas had been issued by the notary under subdivision 2, § 1986, Code Civil Proc.

Without determining whether or not the affidavit was sufficient, we find no provision in the Code authorizing the order to quash the subpoenas. The party desiring to do so has the right to take depositions, and the adverse party will have the right to object when the depositions shall be offered to be read, if the proceedings shall be found to be not in compliance with the statute.

Order annulled.

64 Cal. 423

SWIFT

v.

SHEPPARD.

Filed December 29, 1883.

An injunction is not dissolved or superseded by the taking of an appeal therefrom, and where such appeal is taken this court will grant no order staying the operation of the injunction regularly obtained in the court below, to await the determination of the appeal. Indeed, such a power is no part of its appellate jurisdiction.

In Bank.

W. C. Stratton, for plaintiff and respondent.

P. R. Wright and *R. B. Canfield*, for appellant.

THORNTON, J. This is an application in this court by appellant, Sheppard, for an order staying the operation of an injunction pending the appeal. The action in the court below was for an injunction restraining the diversion of the waters of Brush creek, and, on final hearing, there was judgment in favor of plaintiff for a perpetual injunction. From this judgment the applicant has prosecuted an appeal to this court, which was here for hearing when this application was made. The application bears the marks of an original suit for an injunction, and we cannot see that it comes within the original jurisdiction held to be conferred on this court by the constitution. This court is authorized by the constitution to issue all writs necessary or proper to the complete exercise of its appellate jurisdiction. Const. art. 6, § 4. But there is here no impediment to the exercise of the appellate jurisdiction. The cause is here on appeal as fully as the appellant desired to bring it, and the appellant has encountered no obstacle in so doing. There is then no ground for invoking this jurisdiction. See *Eldridge v. Wright*, 15 Cal. 88; *Hicks v. Michael*, Id. 107.

The court below in this case having adjudged on the trial, after full hearing, that the plaintiff was entitled to an injunction, it does seem to us that this court would be going very far in interfering to suspend the force of its judgment. Such action would have very much the appearance of taking A.'s property and handing it over to B., and referring A. for compensation to an action on a bond.

We are referred to *Hill v. Finnigan*, 54 Cal. 495. In that case the appellant filed an undertaking to stay execution; the sureties were excepted to, and they failed to justify. This court, on application, allowed the appellant to file a stay undertaking. In relation to this, it was observed that "the statute does not treat of undertakings in

the supreme court, and we have no doubt but this court has an inherent power to secure to the appellant the fruits of a successful appeal, if it can be done without depriving the respondent of a substantial right." It will be found that the court had held, as the opinion shows, that the appellant had a right to file a stay undertaking under the statute. See first point in syllabus of case.

The excuse for not filing it previously, in accordance with the provisions of the statute, was satisfactory to the court, and it acting under the general equity powers pertaining to every court, and so frequently availed of and administered on motions, duly accorded to appellant a right which the statute gave him. But in granting it under its inherent equity powers, it declared, in effect, that when the granting of the application would deprive the respondent of a substantial right that this power should not be exercised.

Of this application it may be observed that neither statute law nor law of any kind accords the applicant a stay such as is asked for on filing an undertaking or bond. It is different in that regard from the condition of the appellant in *Hill v. Finnigan*; and further, it having been, on full hearing and trial, adjudged that the plaintiff was entitled to the injunction to restrain the diversion by the moving party of the waters mentioned above, it would be depriving the respondent of a substantial right to suspend or interfere with the exercise of a right as to these waters solemnly decreed to him.

The application must be denied, and it is so ordered.

We concur: MORRISON, C. J., MYRICK, J.

SHARPSTEIN, J., *concurring*. It was early held in this state that an injunction is not dissolved or superseded by the taking of an appeal from the order granting it. *Merced Mining Co. v. Fremont*, 7 Cal. 130. That case has not been overruled, and the statute, in respect to the question now raised, has not been substantially changed. The only question raised by the appeal is whether the injunction was properly granted, and that question must be determined upon the record. Until so determined the presumption is in favor of the correctness of the judgment of the court below. We could not grant this motion without at least modifying the judgment appealed from. If the judgment be reversed it will then be apparent that the appellant was deprived of the use of his property by the granting and continuance of the injunction. But if we grant this motion and finally affirm the judgment it will be equally apparent that the respondent was deprived, in the mean time, of the use of his property.

There is nothing in this case which materially distinguishes it from most of the cases in which appeals are taken from orders or judgments granting injunctions.

We concur: McKEE, J., McKINSTRY, J.

64 Cal. 410

LUNING

v.

WISE.

Filed December 29, 1883.

Mere authority to execute a promissory note for another does not include authority to pay the note when it becomes due.

A presentment to one of two joint makers of a promissory note is insufficient to charge an indorser, unless some legal excuse be shown, for the failure to make presentment to the other, and the death of one of the joint makers does not constitute such excuse, if presentment may be made to the executor or administrator of his estate.

When the maker of a promissory note has no place of business, or his place of business cannot with reasonable diligence be ascertained, presentment for payment is excused. Civil Code, § 3131.

It is presumed that an indorsement on a note was made for valuable consideration before maturity.

Thornton, J., dissenting.¹

In Bank.

Sydney V. Smith & Son, for respondent.

Sully R. Wise, for appellant.

McKEE, J. Action by the indorsee against the indorser upon a promissory note, of which the following is a copy:

"\$475.00.

SAN FRANCISCO, March 24, 1879.

"Thirty days after date, without grace, we promise to pay to the order of T. R. Wise, four hundred and seventy-five dollars, with interest at the rate of one per cent. per month from date until paid. Principal and interest payable only in gold coin of the government of the United States, for value received.

"EDWARD W. JONES.

"By his attorney in fact, Thomas H. Holt.

"THOMAS H. HOLT."

At its maturity the note was not presented to Jones, one of the joint makers, and upon that fact the indorser makes his contention that he is not bound to pay. The note is not made payable at any particular place, but being dated at San Francisco, the presumption is that the makers resided, or had their place of business, there, or at some other place within the state. Story Prom. N. 230.

Upon that presumption it would be necessary for the holder, in order to charge the indorser, to make presentment of the note at maturity to the makers at their respective places of residence or business, at the place where it was dated, or elsewhere in the state, if with

¹ Post 874.

reasonable diligence their places of residence or of business could be ascertained. Subdivisions 1, 2, 4, § 3131, Civil Code.

Holt had his residence or place of business in San Francisco, and to him the note was duly presented at maturity, and payment refused. Yet he had executed the note for his co-defendant Jones upon a power of attorney which authorized him to execute and deliver the note for Jones, but the power of attorney gave him no authority to pay for Jones; and it is well settled that mere authority to execute a promissory note for another does not include authority to pay the note when it becomes due.

Now, it is undoubtedly true that a presentment to only one of two joint makers of a promissory note is insufficient to charge an indorser, unless some legal excuse be shown for the failure to make presentment to the other. *Blake v. McMillen*, 22 Iowa, 358; S. C. 33 Iowa, 150; *Arnold v. Dresser*, 8 Allen, 435; *Union Bank v. Willis*, 8 Metc. 304. The death of one of the joint makers does not constitute an excuse, if presentment may be made to the executor or administrator of his estate. *Hale v. Burr*, 12 Mass. 86. But the circumstance in this case which distinguishes it from those cases is the fact, proved in the case, that at the time of the execution and maturity of the note Jones had no residence or place of business in San Francisco, or within the state of California. He resided in the state of Kentucky, and the question arises, whether that constitutes a legal excuse for the non-presentment of the note to him at maturity. "It seems," says Justice STORY, in his work on Promissory Notes, "that if the maker of a promissory note resides, or has his domicile, in one state, and actually dates and makes and delivers a promissory note in another state, it will be sufficient for the holder to demand payment thereof at the place where it is dated, if the maker cannot personally, upon reasonable inquiries, be found within the state, and has no known place of business there."

In *Ricketts v. Pendleton*, 14 Md. 330, which was an action upon a promissory note dated at Baltimore, and in which it was admitted as a fact that the makers of the note had not, nor had either of them, his or their place of business within the state of Maryland, the supreme court of that state held that the fact excused the holder from making demand upon them at Baltimore, where the note was made payable. "The attempt to make demand," said the court, "would have been futile." See, also, *Selden v. Washington's Adm'r*, 17 Md. 379. And in an action upon a promissory note dated at New Orleans, made by one who resided in the state of Kentucky, it was held by the supreme court of Louisiana that the holder of the note was not obliged to go out of Louisiana to make demand. *Hepburn v. Toledano*, 10 Mart. 261. "If," say the court, "the maker lives in another country, the indorsees cannot be presumed to know his residence, and all that the law requires of the holder is due diligence at that place where the note is drawn." *Id.* "This," says Mr. Justice

SHARKEY, "must be the rule of law, for it is impossible to send notice to the domicile of a party who has none, and it would be absurd to require a party to prove that he diligently tried to find that which he proves had no existence." *Tunstall v. Walker*, 2 Smedes & M. 638; *Moore v. Coffield*, 1 Dev. Law, (N. C.) 247; *McKee v. Boswell*, 33 Mo. 567.

Section 3131, Civil Code, affirms the rule of these cases. "If," says the Code, "the principal debtor have no place of business, or if his place of business cannot, with reasonable diligence, be ascertained, presentment for payment is excused."

Error is also assigned that there was no evidence to show that defendant indorsed the note for a consideration. But the presumption was that he had indorsed it for a valuable consideration before its maturity, (sections 3104, 3122, Civil Code,) and he offered no evidence to the contrary.

Judgment and order affirmed.

We concur: MYRICK, J.; MORRISON, C. J.; MCKINSTRY, J.

SHARPSTEIN, J., *concurring*. In addition to the grounds stated by Mr. Justice McKEE, I attach some importance to the circumstance of payment being demanded of the agent of Jones, who had authority to and did execute this note in the name of Jones. In *Philips v. Astling*, 2 Taunt. 206, it was held if the drawee of a bill went abroad, leaving an agent in England with power to accept bills, that a bill so accepted by such agent must be presented to him for payment, if the drawee continued absent. If the drawee had accepted the draft himself, and then gone and continued abroad, that would have excused presentation to him. And although it does not appear that the agent who accepted said draft for the drawee had any authority to pay it, or to do more than accept it for said drawee, Lord MANSFIELD held that in order to charge the indorser said draft must be presented to the agent who accepted it.

64 Cal. 426

PEOPLE

v.

FLORES.

Filed December 29, 1883.

When the insertion of an unnecessary word in an information does not tend to the prejudice of the defendant, and does not prejudice the information or the description of the offense, it should be disregarded. Penal Code, §§ 960, 1404.

In Bank.

The Attorney General, for appellant.

S. W. Geiss and Ostrander & Knox, for respondents.

McKEE, J. Eliminating from the information the word "accommodation," the description of the offense charged against the defendant was unobjectionable. It may be conceded that the word has no common acceptance; it was therefore useless in connection with the charge; and as its insertion in the information did not tend to the prejudice of the defendant, in respect to a substantial right, and did not prejudice the information nor the description of the offense, it should have been disregarded. Sections 960, 1404, Penal Code.

Judgment reversed, and cause remanded, with instructions to overrule the demurrer.

We concur: MORRISON, C. J.; MCKINSTRY, J.; ROSS, J.

SUPREME COURT OF CALIFORNIA.

64 Cal. 427

ESTATE OF BILLINGS.

Filed January 4, 1884.

Where a testator writes the whole body of the paper offered as an olographic will, the signature thereto, and all of the date except the name of the place and the year, which are printed, such a will is not valid as an olographic will. Civil Code, § 1277.

Department 2.

S. C. Denson, for respondent.*Young & Young* and *A. C. Freeman*, for appellant.

MYRICK, J. The body of the script proposed as an olographic will was entirely written, and was signed by the hand of the deceased. The date reads thus: "Sacramento, April 1, 1880." The words "April 1st" were written by the deceased; the balance was printed, the deceased having evidently taken a sheet of paper with a letter-head, stating the business and location of his firm, the name of the place, "Sacramento," and the year "1880," printed, and filled in the month and day, "April 1st."

We had occasion to consider the principle underlying the facts of this case, in *Estate of Martin*, 58 Cal. 580, and *Estate of Rand*, 61 Cal. 468. Section 1277, Civil Code, requires that a paper, to constitute an olographic will, must be entirely written, dated, and signed by the hand of the testator. It must be entirely written, it must be entirely dated, and it must be entirely signed by him. If it be partly written by him and partly written by another, or printed; if it be partly dated or signed by him and partly by another,—it is not a compliance with the statute. The words "April 1st" do not constitute a date,—do not show on what April 1st, the paper was written,—there being, as was suggested on the argument, many days "April 1st" in the life of any man; it was requisite that the whole date, April 1, 1880, should have been written by him in order to comply with the statute.

Order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

SOUTHERN PAC. R. CO.

v.

BENNETT.

Filed January 4, 1884.

New trial—Failure of court to find upon one of the material issues in the case.

In Bank.

Glassell & Smith, for appellant.

W. A. Gould, for respondent.

BY THE COURT. In *S. P. R. Co. v. Crampton*, 11 Pac. C. Law J. 429, the judgment and order denying plaintiff's motion for a new trial were reversed, on the ground that the court had omitted to find upon one of the material issues. The issues and findings in this case are the same as they were in that, and on the authority of that case the judgment and order denying the motion for a new trial are reversed.

64 Cal. 428

ESTATE OF BURTON.

Filed January 5, 1884.

An appeal from an order setting apart a homestead out of the estate of a decedent must be taken within 60 days. *Estate of Harland*, ante, 159, followed.

A court sitting in probate may examine into the title to a given parcel of real estate mentioned in the inventory as a basis for the exercise of its discretion in selecting or setting apart a homestead; but for the purpose of adjudicating upon the title as between adverse claimants it has no jurisdiction.

Department 2.

Leach & Parker, for appellants.

Hotchkiss & Conklin, for respondents.

MYRICK, J. The appeal in this case is from an order setting apart a homestead, and from an order refusing a new trial. The order setting apart the homestead was made and entered June 27, 1883; the notice of appeal was served September 18, 1883, more than 60 days after the order was made. Section 1715, Code Civil Proc.; *Estate of Harland*, ante, 159. The appeal from this order is therefore dismissed.

As to the appeal from the order denying motion for new trial, it would, doubtless, be competent for a court sitting in probate to examine into the title to a given parcel of the real estate mentioned in the inventory as a basis for the exercise of its discretion in selecting one parcel or the other as a homestead; but, for the purpose of adjudicating upon the title as between adverse claimants, it has no jurisdiction. It determines merely that the parcel named is selected from the estate of the deceased, (whatever his interest therein may have been,) and who are the persons entitled to the benefit of the homestead selection. How far the title claimed by the contestants in this case depended for its validity upon title derived by Mrs. Burton since her husband's death, and how far it depended upon her interest in the estate of her husband as heir or survivor, was not for the probate court to determine. Title to real estate cannot be tried in such proceeding.

Order affirmed.

We concur: SHARPSTEIN, J; THORNTON, J.

64 Cal. 429

PLUMMER

v.

BROWN.

Filed January 7, 1884.

Parties who have acquired the entire interest of a defendant in the subject-matter of an action are his "legal representatives," within the meaning of that phrase as used in section 473 of the Code of Civil Procedure, and the court may, upon such terms as may be just, relieve them from a default taken against him through their mistake, inadvertence, surprise, or excusable neglect.

Department 2.

Baxter & Gould, for appellant.

Bicknell & White and *Thom & Stevens*, for respondent.

BY THE COURT. We think that Martha Brown and Thom, after acquiring the entire interest of the defendant in the subject-matter of this action, were his "legal representatives," within the meaning of the phrase as used in section 473, Code Civil Proc. "An assignee or grantee is a legal representative of the assignor or grantor in regard to the thing assigned or granted." *G. G. R. R. & B. Co. v. Bryan*, 8 Smedes & M. 275. They certainly had acquired the right to repre-

sent him. The transfer of his interest to them entitled them to have the action continued in his name, or the court might allow them to be substituted for him. Code Civil Proc. 385. "To represent a person is to stand in his place, to act his part, exercise his right, or take his share." Abb. Law Dict. Being the legal representatives of the defendant, the court was authorized, upon such terms as might be just, to relieve them from a default taken against him through their mistake, inadvertence, surprise, or excusable neglect. After transferring his entire interest in the subject of the controversy the defendant was only nominally a party to the action. The real parties in interest were his grantees. The entry of his default affected them, not him. It is the duty of all courts to construe the provisions of the Code "liberally, with a view to effect its objects and to promote justice." Code Civil Proc. 4. And being satisfied that the moving parties were, upon the showing made by them, entitled to the relief granted, the order of the court below is affirmed.

SUPREME COURT OF CALIFORNIA.

64 Cal. 410

LUNING

v.

WISE.¹

Filed January 10, 1884.

In Bank.

THORNTON, J., *dissenting*. I respectfully dissent from the judgment of the court in this case. The decision of the court below in this case is as follows:

"(1) That on the twenty-fourth day of March, 1879, Edward W. Jones and Thomas H. Holt executed and delivered to the defendant their promissory note, which is set forth in the complaint, and that on said day defendant, for a valuable consideration, indorsed and delivered said note to plaintiff, who ever since then has been, and is now, the legal holder and owner thereof.

"(2) That no part of said note or of the interest thereon has been paid.

"(3) That on the twenty-third day of April, 1879, plaintiff presented said note to Thomas H. Holt, in the city and county of San Francisco, state of California, and demanded payment of said note and interest thereon, then due from said Holt, individually, and as the attorney in fact for said Edward W. Jones; and that said Holt, for himself and as such attorney in fact, then refused to pay said note, or the interest, or any part thereof.

"(4) That thereupon, on said last-mentioned day, the plaintiff caused said note to be protested for non-payment thereof, of which presentment and demand and refusal and protest the defendant on said day had full notice.

"(5) That said Holt had full power and authority to execute and deliver said note for and on behalf of said Jones, but that said Holt did not have authority from said Jones to pay said note when it was presented for payment to said Holt as aforesaid.

"(6) That said Jones, neither at the date of said note nor at any time since, had or has had any place of business or residence in this state; and at the time of the execution of said note, and of said demand, was not in this state, but resided and had his place of business in the state of Kentucky.

"(7) That the interest on said note from its date, at the rate specified therein, amounts now to the sum of \$132.25 in gold coin of the United States."

¹For majority opinion, see *ante*, 495.

And from the foregoing facts the court finds the following to be its conclusion of law: "That the plaintiff is entitled to judgment against the defendant for the sum of \$607.25 in said gold coin, and it is so ordered." Judgment was entered in accordance with the conclusion of law.

1. The consideration of the indorsement, by Wise to Luning, of the note sued on, may be presumed. Civil Code, § 3104. There was no evidence to rebut this presumption, and the court, therefore, did not fall into error in holding that the indorsement aforementioned was supported by a consideration.

2. The defendant moved for a nonsuit on the ground that no demand was shown upon Jones, the maker of the note. One of the grounds on which the defendant moved for a new trial was that the evidence was insufficient to justify the decision, in that it does not show that the note sued on was ever presented to and demand made of Edward W. Jones, nor that defendant ever had any notice of it. It appears from the statement that Jones, the co-maker with Holt of the note in suit, was, when the note was executed, and ever since has been, a resident of Paris, county of Bourbon, and state of Kentucky, and that his place of business was there; that during the period above mentioned he was in the place above named in Kentucky, and had no place of business in the city and county of San Francisco. It also appears by the statement that Luning, when he took the note, was informed of the facts above detailed as to the residence and place of business of Jones.

The foregoing appeared in the opening of plaintiff's case, with other facts sufficient to maintain the action, unless the facts just above specially detailed establish the contrary. The finding on the subject of Jones' place of residence and business is quoted above. See sixth finding. To bind the indorser, there must be a presentment of the note to the maker and demand of payment at the time of its maturity, or as soon after as practicable in the use of reasonable diligence. This is the general rule, but circumstances may excuse it.

The question here presented for decision is whether, as Jones, one of the makers of the note, was a non-resident of the state, as above set forth, and had no place of business in the state of California when the note was executed and fell due, it was necessary to make presentment to him in Kentucky of the note, and demand payment, to bind the indorser, defendant here, or was he excused from making such presentment, etc., by reason of the non-residence of Jones? On this question the cases are in conflict. There are two cases on this point in the Maryland Reports,—*Ricketts v. Pendleton*, 14 Md. 320, and *Selden v. Washington's Adm'r*, 17 Md. 379. The first case relates to a promissory note, and holds that when the makers of a note do not reside within the state, and have no place of business within the state, no demand upon them is necessary. It is ruled in this case that the mere fact of residence of the maker in a state other

than that in which the holder resides, excuses him from making presentment and demand of payment. In this case the makers were non-residents at the time the note was executed and when it matured. In the case last cited from Maryland, under like circumstances, the same ruling was made, following *Ricketts v. Pendleton*.

Hepburn v. Toledano, 5 Mart. (La.) 316, is also another case on the point under consideration, in which it is held that if the maker resides in another country, the indorsers cannot be presumed to know his residence, and all that the law requires of the holder is due diligence at the place where the note is drawn. But it does not appear distinctly from the report of the case whether the maker was a non-resident at the time the note was executed. It does appear that when the note fell due, the maker, who executed the note in Louisiana, was a resident of Kentucky. If the maker was at the time the note was made a resident of Louisiana, and before it matured removed to Kentucky, the holder need not follow him to make presentment and demand. *Anderson v. Drake*, 14 Johns. 114; *Taylor v. Snyder*, 3 Denio, 151, 156. See remarks on page 156 as to *Hepburn v. Toledano*.

The cases in New York are directly opposed to the Maryland cases above referred to. The case earliest decided was *Taylor v. Snyder*, *supra*. In this case the note was made by Mr. Snyder, payable to the order of defendant,—no place of payment being mentioned,—and was dated at Troy, October 15, 1839. It appeared that the maker was, when the note was dated and when it fell due, a resident of Apalachicola, state of Florida. The holder at the time the note fell due knew that the maker resided at Apalachicola. When the note matured plaintiff caused it to be presented for payment to the defendant at his store in Troy, which was refused. Notice of dishonor was then given to defendant. The circuit judge held that the plaintiff was not entitled to recover. The supreme court sustained the ruling of the court below. The court, per BEARDSLEY, J., as to the point under discussion said: "Where a promissory note is not made payable at any particular place, the general rule of law is that in order to charge the indorser payment must be demanded of the maker personally, or at his dwelling-house, or other place of abode, or at his counting-house, or place of business. But, although such is the general rule, yet under various circumstances a demand in any form or manner may be dispensed with. It is a question of diligence, and if a demand is found to be impracticable,—proper efforts for that purpose having been made,—the indorser will still be held liable, due notice having been given to him by the holder."

The learned judge then proceeds to give four instances where the demand is excused. They are: (1) Where the maker has absconded; (2) where the maker is a seaman on a voyage, having no domicile in the state; (3) where the maker has no known residence or place at which the note can be presented for payment; and (4) where a note is made by a resident of the state, who, before it is payable, removes

from the state and takes up a permanent residence elsewhere. In this last case the holder need not follow him to make the demand, but it is sufficient to present the note for payment at the maker's former place of residence. In the instances just mentioned reasonable diligence does not require a demand on the maker personally. The circumstances detailed excuse it. It is well to advert to the observations made in the opinion as to these exceptions. "These exceptions to the general rule," said the court, "it will be seen, all rest on peculiar reasons. In the one the maker has absconded; in another, he is temporarily absent, and has no domicile or place of business within the state; in the third, his residence, if any he has, cannot be ascertained; while in the fourth he has removed out of the state and taken up his residence in another country. In each of these instances, let it be observed, the fact constituting the excuse occurs subsequently to the making and indorsement of the note; and it is this new and changed condition of the maker, and that only, by which the indorser stands committed without a regular demand."

The court then proceeds to inquire whether another exception should be added and extended to a case where no change in the condition of the parties from that which existed when the note was made had taken place,—“where the maker, when the note was made and indorsed, had a known residence in another state, and which remained unchanged at the maturity of the note.” The court holds that such exception is not justified by any rule of law, and disallows it. The conclusion is fortified by the following course of reasoning: “The indorsement of a note is an order to the maker to pay the amount to the indorsee or holder, as is specified and agreed in the note, and an engagement by the indorser that if the note is duly demanded of the maker and not paid, or if it shall be found impracticable to make a demand, the indorser will himself, on receiving due notice, pay the amount to the indorsee or holder. Now, where such an order is drawn upon a maker who resides in another state, and which is well known to the person in whose favor the order is drawn, upon what principle can it be said that a demand of the maker is unnecessary? The indorsee voluntarily consents to take such an order, and why should he not perform the condition on which the ultimate liability of the indorser depends? I confess I see no reason why he should not. Here is no mistake, or misapprehension of fact, at the time the indorsement is made. The indorsee knows where the maker resides, and that it is in another state. He knows that by law, unless the intervention of a state line makes a difference, the maker must be sought where he resides, and the demand must be made there. When the time for payment arrives, the maker is still at his former residence: the facts of the case are precisely as they were when the order was drawn. Why, in such a case, should the state line make a difference in the construction and legal effect of this contract of the indorser? It was fairly entered into between the parties; let it, then,

be fairly observed and performed by them." The court concludes that the introduction of a state line has no possible bearing on the question, and, on the ground that no demand on the maker was made, sustains the ruling of the court below that the plaintiff should not recover.

I have quoted freely from this case, for the reason that the question is more fully discussed in it than in any other I could find. *Taylor v. Snyder* was decided in 1846. *Gilmore v. Spies*, 1 Barb. S. C. Rep. 158, in which a like ruling as in *Taylor v. Snyder* was made, was decided in 1847. In this case the maker resided out of the United States, and in Matamoras, Mexico, when the note was made, and when it fell due. A demand was, nevertheless, held necessary. This case was taken by writ of error to the court of appeals, where the judgment of the supreme court was affirmed. *Spies v. Gilmore*, 1 N. Y. 321, decided in 1848. GARDINER, J., dissented, on the ground that the maker resided in a foreign country. He thought that "the necessity of a personal demand should be confined to cases where the maker resides within the states or territories of the Union." He approved *Taylor v. Snyder*, as did all the justices. BRONSON, J., and JEWETT, C. J., delivered opinions in favor of affirmance. Attention is called to some remarks of these distinguished jurists. Said BRONSON, J.: "The only excuse which has been offered for not making demand is that it would have been inconvenient to go or send to Matamoras for that purpose. It is often inconvenient to present the note for payment when the maker and holder both reside in the same state; and yet, when the maker has a known place of residence, and there has been no change of circumstances after the giving of the note, mere trouble or inconvenience to the holder has never been held a good excuse for omitting the demand. And this is so, however wide asunder the maker and the holder may live. If the plaintiff wished to avoid the inconvenience of sending to Matamoras, he should have made the note payable in New York, or got an indorsement with a waiver of demand. He has no right to change the contract which the indorser made, for the purpose of promoting his own convenience." JEWETT, C. J., observed: "I cannot assent to the truth of the position assumed, that because the maker and indorser of a promissory note, at the time of the making and indorsing, reside in another state or foreign country, the indorser may be held liable without any demand being made on the maker; especially when such residence was known to the holder at the time the note was made, and has not been changed before the maturity of it. And in this there is no injustice. For it is but reasonable to conclude that each party contracted upon the supposition that the holder should make a demand of payment on the maker, at maturity, at the place of his residence, and, if not paid, give notice to the indorser, or else a *place* as well as a time of payment would be stipulated for in the note itself. To hold that a demand and a notice can be dispensed with on the ground that the

maker and indorser resided in a foreign country at the time of the making and maturity of the note, would, in my judgment, be nothing short of judicially changing the terms and legal effect of the contract between these parties." See *Packard v. Lyon*, 5 Duer, 82.

The cases in Massachusetts, in the main, are in accord with the New York cases above cited. *Smith v. Philbrick*, 10 Gray, 252, was decided in 1857. It appears, from the report of the case, that the maker was a resident of Port Lavacca, state of Texas, where he had his only place of business, and that the note was made at Boston, where the maker was on a temporary visit. The court held that as there was no evidence that the plaintiff, or any of the subsequent holders of the note, knew where the maker's residence was, that he made all proper inquiries as to such residence at Boston, the place of its date, which was the proper place of inquiry, and that he had used the diligence in this regard that the law required, the plaintiff was, therefore, excused from presentment at Port Lavacca. It is said in the opinion that if the holder had known, at the maturity of the note, the place of the maker's residence, it might, *perhaps*, have been incumbent on him to have forwarded the note to Port Lavacca for presentment, or to have used all due diligence to have done so. *Bank of Orleans v. Whittemore*, 12 Gray, 469, was decided in 1860. This case approves *Taylor v. Snyder* and *Spies v. Gilmore*, and the judgment agrees with the conclusions reached in those cases. In the opinion the rule is thus stated by METCALF, J.: "Where the maker of a note, where it is made and indorsed, has a known residence out of the state, which residence remains unchanged at the maturity of the note, demand must be made on him, or due diligence used for that purpose, and notice of non-payment given to the indorser before the indorser can be charged." In this case the note was executed in Boston, and the maker resided at that time, and when the note fell due, at Newbern, North Carolina. The fact of his residence was known to plaintiff's agent when he purchased the note for the plaintiff, and hence held known to the plaintiff. See, also, *Burrows v. Hannegan*, 1 McLean, 309, decided in 1838, and reaching same conclusions as *Taylor v. Snyder*.

On the authority of the cases above cited from Maryland and Louisiana, Judge STORY, in his work on Promissory Notes, § 236, says: "It seems also that if the maker of a promissory note resides and has his domicile in one state, and actually dates and makes and delivers a promissory note in another state, it will be sufficient for the holder to demand payment thereof at the place where it is dated, if the maker cannot personally, upon reasonable inquiries, be found within the state, and has no known place of business there."

It is clear, from the guarded language used by the learned jurist just above quoted, that he did not give to the rule stated the full sanction of his judgment. See STORY, *Prom. Notes* (6th Ed.) § 236, and cases cited in note 3, § 264, *Id.*

I think the better rule is that laid down in *Taylor v. Snyder and Spies v. Gilmore*. It is more in accordance with the analogies of the law, and the principles controlling the duty of the holder of a negotiable note in regard to presentment to and demand of the maker at maturity. It is also in accord with the rule prescribed in section 3131 of the Civil Code, requiring the presentment for payment to be made to the maker at his place of business or residence, unless where such place of business or residence cannot with reasonable diligence be ascertained. Sub. 6, § 3131, Civil Code. There is no exception in this section, where a maker resides in another state, in case the residence or place of business in such state can, by reasonable diligence, be ascertained. The indorser, when he puts his name on a note, when the maker is a resident and has his place of business in another state at the time of the making of the note, and when it matures, contracts that, before he shall be bound, presentment and demand shall be made to the maker personally, or at his place of business or residence, unless the holder is ignorant of such residence or place of business, and cannot, by reasonable diligence, ascertain where they are. To hold otherwise would be to make a contract for the indorser other than that which he has agreed to. I am of opinion that presentment and demand were requisite in this case to charge the defendant.

It may be said that there are here two makers, living far apart, and inasmuch as presentment and demand must be made on the day that the note falls due, that the law cannot be complied with in this particular, and therefore, if presentment and demand of both makers are required, the indorser cannot be held, because under the circumstances the holder cannot make such presentment and demand on the day of maturity. But the law does not require that which is impossible. The presentment and demand must, under such circumstances, be made to one maker on the day of maturity, and to the other within such a period as reasonable diligence under all the circumstances demands. I find no decision on this point, but such seems to be the view of able and learned writers to regard to it. See Story, Prom. Notes, § 239; 1 Pars. Notes & Bills, 363, note w.; 1 Daniel, Neg. Inst. § 595. The presentment to the co-maker, Holt, and demand on him, were not equivalent to presentment to and demand of Jones, as the former was not the authorized agent of Jones for any such purpose; nor does it appear, if Holt had such authority, that the indorser who had not agreed to it would be bound by it. The difficulty might be avoided when the note is made, by requiring the indorser to waive presentment and demand, or the note might be made payable at a particular place.

In this case, on the opening evidence for the plaintiff, it appeared that the holder, when he took the note, was informed of the residence of Jones, the maker, in Kentucky. There was no evidence of presentment or demand on him, and consequently the defendant cannot

be held liable. The nonsuit should therefore have been granted. The findings of fact do not support the judgment, as the court does not find any presentment and demand of the maker Jones, and no circumstances which excuse such presentment and demand are found.

It follows, from the foregoing, that the judgment and order should be reversed, and the cause remanded for a new trial.

64 Cal. 431

In re ROBB, on Habeas Corpus.

Filed January 10, 1884.

The superior court of San Francisco has power to compel the production of the body of a prisoner before it, and has jurisdiction to inquire into the cause of detention. If the party having the prisoner in charge refuse to produce him in obedience to the writ of *habeas corpus*, he is guilty of a contempt of court.

In Bank.

Alfred Clark, for petitioner.

MORRISON, C. J. On the twentieth day of November, 1883, the governor of this state issued a warrant for the arrest of one C. H. Bailey, reciting therein that "whereas it has been represented to me by the governor of the state of Oregon that C. H. Bailey stands charged with the crime of embezzlement, committed in the county of Clatsop, in said state, and that he has fled from the justice of that state and has taken refuge in the state of California; and the said governor of the state of Oregon having, in pursuance of the constitution and laws of the United States, demanded of me that I should cause the said C. H. Bailey to be arrested and delivered to W. L. Robb; and whereas, the said representation and demand are accompanied by a certified copy of an information, etc.,—you are therefore required to arrest," etc. In pursuance of the command of the foregoing warrant of arrest, the alleged fugitive from justice was arrested by the chief of police of the city and county of San Francisco, and was delivered by him to the petitioner to be taken back to the state of Oregon for trial. While Bailey was in the custody of the petitioner Robb, under and by virtue of the authority above stated, he (Bailey) applied to the superior court of the city and county of San Francisco for a writ of *habeas corpus*; stating in his petition, among other things, that he is "unlawfully imprisoned, detained, confined, and restrained of his liberty by one W. L. Robb at the old city hall, in the city and county of San Francisco; that the said imprisonment, detention, confinement, and restraint are illegal; and that the illegality thereof

consists in this, to wit: that petitioner is held under a warrant of arrest, a copy of which is hereto annexed and made a part hereof; that said warrant is issued without authority of law and against the law, in this, that the provisions of the act of congress have not been complied with in this, that no copy of an indictment found or affidavit made before a magistrate charging petitioner with any crime has been produced to the governor of California," etc.

On this petition a writ of *habeas corpus* was issued by the superior court of the city and county of San Francisco, on the twenty-first day of November, 1883, directed to W. L. Robb, commanding him to have the body of Charles H. Bailey, "by you imprisoned and detained, as it is said, together with the time and cause of such detention and imprisonment, etc., before T. K. Wilson, judge of the superior court in and for the city and county of San Francisco," at a time and place therein mentioned. The petitioner Robb refused to produce the body of Bailey, in accordance with the command of the writ, and in return thereto stated that he held him under the laws of the United States, and therefore ought not to produce the prisoner. Robb also appends to his return, and makes a part thereof, copies of the papers under which his authority to hold the prisoner is asserted. On the coming in of the foregoing return, and on the refusal of Robb to have the body of Bailey before the court, as commanded by the writ, the superior court adjudged Robb guilty of a contempt of court, and imprisoned him therefor. It is this imprisonment of which he complains, and from which he seeks to be released by this writ of *habeas corpus* granted him by this court, and which is now the subject of consideration.

It is no part of our duty to decide whether the authority under which Robb holds the prisoner, Bailey, is sufficient or not. Neither is it incumbent on us to decide whether Bailey is held under the authority of the United States, and if so, how far it is competent for the court below to inquire into the legality of the proceedings under which he is held. Whether an affidavit or indictment must accompany the requisition or not; whether the recitals in the governor's warrant of arrest are conclusive, or simply *prima facie* evidence of the facts they recite,—all these are matters for the consideration of the court issuing the writ, and before whom the prisoner is to be brought. The only inquiry in this case relates to the power of the court below to compel the production of the body of the prisoner before it, so that the cause of his imprisonment and detention can be inquired into, and on this point we have no doubt. It was not the duty of the court issuing the writ, nor was it obliged to accept as true, the return of the party. It was within the jurisdiction of the court, at least, to inquire into the facts of the case, and the alleged cause of detention, and to this end it was proper that the prisoner should be brought into the presence of the court, in obedience to the command of the writ, whereupon the prisoner would have had a right to traverse the

return. *People v. Donahue*, 84 N. Y. 438; *People v. Brady*, 56 N. Y. 182; *Norris v. Newton*, 5 McLean, 99; *State v. Schleman*, 4 Harr. (Del.) 577. This the petitioner refused to do, and by such refusal was guilty of a contempt of court.

Writ dismissed and prisoner remanded.

We concur: MYRICK, J.; SHARPSTEIN, J.; THORNTON, J.; MCKEE, J.; MCKINSTRY, J.

CITY OF LOS ANGELES

v.

WALDRON.

Filed January 14, 1884.

A petition alleging that "the council duly passed an ordinance in writing" condemning certain property, and "that it is now necessary to condemn said land for public use," is a sufficient showing of the passage of the ordinance, (the same being set forth,) and of the necessity of taking the land referred to for public use.

The ordinance of the council is equivalent to a resolution, and the petition sufficiently describes the property to be condemned.

Department 2.

W. S. Stephenson, for petitioner.

John F. Godfrey, for defendant.

SHARPSTEIN, J. It is insisted on behalf of respondents that the demurrer to the petition was properly sustained,—

First. Because it is not alleged that it is necessary to take the property sought to be condemned for any municipal or public use. It is alleged "that the council of said city, on the fourth day of November, 1882, duly passed and adopted an ordinance in writing" directing proceedings to be taken to condemn certain property of the respondents for the purpose of widening Main street, between Washington and Adams streets, and "that it is now necessary to condemn said land for public use agreeably to the provisions of said ordinance." We think this a sufficient allegation of the necessity of taking the land referred to for public use.

Second. Because it is not alleged that there was a publication (of the ordinance, we presume) in a newspaper published in Los Angeles once a week for two weeks. But the section of the city charter to which we are referred in support of this objection relates to the publication of notice of the presentation to the court. That notice is in the nature of a summons, and by appearing and demurring the respondents waived it.

Third. Because the ordinance provides that "if, within twenty days from the publication of this ordinance, the owners of property fronting along Main street, or cross streets forming a junction therewith within the limits to be assessed, amounting to two-thirds of said frontage, shall make and file with the clerk of the council a written remonstrance against said proposed improvements thereupon, the same shall not be further proceeded with." The objectionable words are, "or cross streets forming a junction therewith." In the preceding section (2) the council had declared that "the assessment for the payment of the damages sustained by reason of said improvements shall extend on both sides of Main street, from Washington street to Adams street." By section 3 it was only the owners of property "*within the limits to be assessed*" who were authorized to remonstrate, and those limits were prescribed by section 2. This appears to us to be sufficiently certain.

Fourth. Because the petition does not show that any ordinance has ever been passed. We think it does. It alleges that the council "duly passed and adopted" the ordinance, a copy of which is set forth in the petition.

Fifth. Because it is made the duty of the common council, by section 8 of article 8 of the charter, to do by resolution what it attempted to do by ordinance. The latter, in our opinion, is the equivalent of the former.

Sixth. Because the property sought to be condemned is not sufficiently described. We think it is.

Judgment reversed, with directions to the court below to overrule the demurrer, with leave to the defendants to answer within 10 days after being notified thereof.

We concur: THORNTON, J.; MYRICK, J.

64 Cal. 434

In re GEORGE W. TYLER, on *Habeas Corpus*.

Filed January 15, 1884.

It is the right and duty of an attorney to bring before the court the fact of bribery or corruption of a grand jury, and any citizen may, in a regular way, call the attention of that body to any exculpatory evidence that may prevent a party from being tried on a criminal offense without sufficient cause; but it is unlawful for any one to send threatening and insulting letters to the grand jury, and such conduct is punishable, not only as a contempt of court, but as an offense against the criminal law.

A fine of \$500 is within the jurisdiction of the court, and it has the power to enforce the payment of the same by imprisonment.

In Bank.

W. B. Tyler, for petitioner.

Fluornoy, Mhoon & Fluornoy and Scrivner & McKinne, of counsel.

McKEE, J. From the return to the writ issued in this proceeding it appears that the petitioner has been imprisoned under an order of commitment, made by the superior court of the city and county of San Francisco, for a contempt of court, of which he has been adjudged guilty and sentenced to pay a fine of \$500, or be imprisoned until payment of the fine at the rate of \$2 per day for every day's imprisonment. The order was made by a court of competent jurisdiction, and the only questions arising out of the return are whether the act, for which the petitioner has been adjudged guilty and punished, constituted a punishable contempt of court; and whether the court exceeded its jurisdiction in the punishment which it inflicted. An act which is lawful or meritorious in itself, or which has been done in the assertion of a lawful right, is not a punishable criminal act merely because it has been so adjudged. In this instance the act condemned and punished consisted of writing and sending to a grand jury, then sitting in the court in and for which it had been impaneled and sworn, a letter, signed by the petitioner as "attorney for Mrs. Sharon," and addressed to "W. T. Garrett, Esq., and members of the grand jury," reflecting by severe and opprobrious language upon the conduct and integrity of the jurors in connection with charges which were the subject of investigation against the woman whom the petitioner represented as attorney. In substance, it accused and denounced many of the jurors of permitting themselves to be corruptly used by a person of wealth for the purpose of making presentments or finding indictments against the woman upon matters which were the subject of litigation between her and him in the civil courts, to gratify his private malice, to oppress and crush the woman by his wealth, and to obstruct the course of justice in the civil tribunals.

If the invectives against the person named in the letter, and others who are accused of having been hired by him to aid and abet him in his design, were founded upon facts, and the petitioner, as an attorney of the court, had suggested them to the court in a regular way, it is not to be doubted that upon such a suggestion judicial inquiry would have been instituted, and that, if they there were adduced any evidence at all to sustain the suggestion, prompt action would have been taken to vindicate law, maintain the respect due to the court, and to protect the court and the grand jury under its supervision and legal control against persons implicated in the attempt to commit, or in the commission of, such criminal acts. For it is criminal to tamper with, or to attempt to tamper with, a jury or judicial officers in the performance of their duties. Bribing or offering to bribe, corruptly influencing or attempting to influence, a juror by means of

promises or assurances of any pecuniary or other advantage, or by means of any threat, intimidation, persuasion, or entreaty, or by means of any communication, oral or written, had with him, except in the regular course of proceedings, in respect to his verdict or decision in any cause or proceeding, are made by law criminal offenses, punishable by imprisonment in the state prison. It is also a penitentiary offense for a juror to willfully and corruptly permit any communication to be made to him * * * relating to any cause or matter pending before him, except according to the regular course of proceedings; or "to receive any bribe upon any agreement or undertaking that his vote, opinion, or decision upon any matter or question which is or may be brought before him for decision shall be influenced thereby." Sections 93, 95, 96, Penal Code. And such criminal acts are also punishable as contempts of court, for they taint with suspicion the proceedings which they touch; embarrass, hinder, and delay courts in the exercise of their functions; and, if suffered to pass unrebuked and unpunished by the court whose proceedings are tainted by them, they result in a paralysis of judicial confidence. To prevent, arrest, and punish for such offenses, whether committed or attempted to be committed by or upon any grand juror, is therefore the duty of every court in which such a jury may be sitting in the discharge of its duties; and if guilt should be found to attach to members of the grand jury, the jury should be promptly discharged, and the matters against the members thereof should be referred to another grand jury. Not only would it be greatly embarrassing to the administration of justice, but exceedingly mischievous in every way, to overlook, or in any way sanction, such acts. It is of the highest importance that jurors and judicial officers should be protected and preserved, not only from all improper influences, but even from the suspicion of such influences.

But while it is the right and duty of an attorney to address himself to a court for the purpose of putting in motion the power of the court to prevent the commission of such criminal acts, or to vacate and set aside proceedings tainted by them, or to convict and punish persons guilty of them, it is altogether irregular, unlawful, and criminal to send accusatory and threatening communications to a court, or jury sitting with it, while engaged in the discharge of its duties. None should know better the relation between court and jury, and the consideration and respect due to them, than an attorney, who is an officer of the court, bound by his oath of office "to support the constitution and laws; to maintain the respect due to the courts of justice and judicial officers; to employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law; and to abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the case with which he is charged." Section 282, Code Civil Proc. None

knew better than the petitioner that in the investigation of offenses which are within their knowledge, or which have been brought to their attention by the court or district attorney, a grand jury cannot receive any other evidence than the testimony of witnesses produced and sworn, or documentary evidence, or the depositions of witnesses taken according to law, and that the course which he pursued was forbidden by law, and violative of the duty which he owed to the court.

Unquestionably, the fact of the existence of exculpatory evidence may be brought by any citizen to the attention of the grand jury in a regular way. If such evidence exists, and they have reason to believe that it is within their reach, they may request it to be produced, and for that purpose may order the district attorney to issue process for the witnesses, (section 920, Penal Code,) to the end that the citizen may be protected from the trouble, expense, and disgrace of being arraigned and tried in public on a criminal charge for which there is no sufficient cause. A grand jury should never forget that it sits as the great inquest between the state and the citizen, to make accusations only upon sufficient evidence of guilt, and to protect the citizen against unfounded accusation, whether from the government, from partisan passion, or private malice. But the letter was neither written nor sent for the purpose of informing the grand jury of evidence which would explain away the charges under investigation against the petitioner's client. It was aimless for any purpose, except to exasperate the jurors by the aspersions upon their official conduct which it contained, or to deter them from performing their duties by the threats of public clamor which it expressed, or to create a distrust and want of confidence in any action which might be taken as the result of their investigation, and thus to embarrass the court itself in the administration of justice. That such a communication to a jury sitting in or in connection with a court of which it is a component part, and while engaged in the exercise of its functions, is a punishable contempt of court, does not admit of doubt. "Any publication, whether by parties or strangers, which concerns a case pending in court, and has a tendency to prejudice the public concerning the merits, or which reflects on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel, may be visited as a contempt." Bish. Crim. Law, § 216. It would be strange if, under a government of law, it were otherwise. On the part of an attorney it is not only a violation of the duty which he owes to the court, but an inexcusably unlawful interference with its proceedings, (subsections 3, 9, § 1209, Code Civil Proc.,) directly tending to impair the respect due to its authority. Section 166, Penal Code. As such, the act of the petitioner was punishable not only as a contempt of court, but as an offense against the criminal law.

In the punishment inflicted the court did not exceed its jurisdic-

tion. It had jurisdiction to punish by fine not exceeding \$500, or imprisonment not exceeding five days, or by both. Section 1218, Code Civil Proc. In the exercise of its jurisdiction it imposed a fine of \$500, and that exhausted its statutory power of punishment. But the committal was not an additional punishment; it was simply the written mandate or process by which the court undertook to enforce its judgment. A judgment of fine is enforceable by an execution as on a judgment in a civil action, (section 1214, Penal Code; section 1006, Code Civil Proc.;) or by commitment under the criminal law, (section 1215, Penal Code.) A person against whom such a judgment has been pronounced, has, therefore, the privilege, under the law, of paying it either by money or by imprisonment. If he pays in money there can be no commitment. If he refuses to pay in that way, the commitment follows as an incident to the judgment, until the judgment has been complied with according to law. Sections 1215, 1459, *supra*; *Ex parte Crittenden*, 7 Pac. C. L. J. 483.

The petitioner is remanded.

CONCURRING OPINIONS.

We are of opinion that the petitioner, in sending the letter set forth in the return, (containing as it did threatening and insulting language,) was guilty of contempt, and that he thereby subjected himself to punishment. We are also of opinion that the court had power to enforce the payment of the fine imposed by the method adopted by it. *Ex parte Crittenden*, 7 Pac. C. L. J. 483.

We therefore concur in the judgment.

MYRICK, J.
MORRISON, C. J.
McKINSTRY, J.

That the grand jury is a part of the court I think to be too well settled to be now disputed. Any citizen has a right to present charges of misconduct against any member or members of the grand jury, to the court of which it forms a part, that the same may be investigated. But an insulting letter addressed and sent to such jury in relation to their functions, and saying to them that if they find an indictment against a person whose cause is before such jury for investigation the community will conclude that they have been bribed to do so, is not submitting charges against them to the court, but is an unlawful interference with the proceedings of the court, tends to intimidate the grand jury in the discharge of their duties and to obstruct the course of justice, and is a contempt of court. Section 1209, Code Civil Proc. The court below clearly had jurisdiction of the matters involved in this case; to fine, and to designate the mode of collecting the fine, which was adopted by its judgment. This is true

if we measure the power of the court by the statute of this state, and was so ruled in *Crittenden's Case*, 7 Pac. C. L. J. 483. The court's having jurisdiction determines this case.

In my opinion the applicant for the writ should be remanded and the writ discharged.

THORNTON, J.

I concur in the judgment. I think no one would be to the trouble of communicating his views in writing to a grand jury on a matter which it had, or was likely to have, before it, unless he expected thereby to influence its action; and I think the policy of the law is to keep juries as free as possible from outside influence. How that can be done, if every one who feels so inclined shall be at liberty to communicate his views in writing to a jury on any matter which it may have before it, is to me inconceivable. I think that every act of the kind constitutes an unlawful interference with the proceedings of a court.

SHARPSTEIN, J.

64 Cal. 440

PEOPLE

v.

DAVIS.

Filed January 16, 1884.

The charge that the jury must be satisfied of the guilt of the prisoner "beyond a reasonable doubt," is applicable to all criminal cases, as well where the evidence is direct as where it is circumstantial. In the latter case it is proper for the judge to further instruct the jury, so as to aid them in reaching a conclusion on the *circumstances* proved.

If any part of a single instruction ought not to be given, the action of the trial court in rejecting the whole will always be affirmed.

In Bank.

Atty. Gen. Marshall, for respondent.

W. S. Harris and *S. M. Franklin*, for appellants.

BY THE COURT. Defendant was found guilty of grand larceny on circumstantial evidence. Counsel for defendant requested the court to charge the jury as follows: "The following principle of law is of universal application in all cases based on circumstantial evidence. It is not sufficient that the circumstances proved coincide with, account for, and therefore render probable, the hypothesis sought to be established, but the hypothesis contended for by the prosecution must be established to an *absolute moral certainty*, to the entire exclusion of any *rational probability* of any other hypothesis being true, or the jur

must find the defendant not guilty." The offered instruction was by the court rejected as "superfluous—included in other instructions."

An instruction with reference to circumstantial evidence would not have been "superfluous." The charge, given in different forms, that the jury must be satisfied of defendant's guilt "beyond a reasonable doubt," is a legal proposition applicable to all criminal cases, as well where the evidence is direct as where it is circumstantial, and the court might very properly have instructed the jury further in such manner as would have assisted them in reaching a correct conclusion upon the *circumstances* proved.

The rule as laid down by Greenleaf is: "Where a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with every other rational conclusion." 1 Greenl. Ev. § 34. The rule was adopted and approved in *People v. Schuler*, 28 Cal. 490, and followed in *People v. Strong*, 30 Cal. 154; and in *People v. Anthony*, 56 Cal. 400, this court held an instruction not objectionable which read: "It is not sufficient that the circumstances proved coincide with, account for, and therefore render probable the hypothesis sought to be established by the prosecution, but they must exclude to a moral certainty every other hypothesis but the single one of guilt," etc.

But, when it is urged here that the court below erred in rejecting an instruction requested, we are justified in reversing the judgment only when it appears that it was the duty of the court to give the instruction exactly as requested. It has been repeatedly held that if any part of a single instruction ought not to have been given, the action of the trial court in rejecting the whole will be affirmed; and this result must follow when any part of a single instruction is so worded as that it may have a tendency to mislead the jury, as well as when a part directly declares that to be law which is not law. A philologist may be able to say that the word "absolute," in the instruction requested and rejected, adds no force to the words "moral certainty." But the word suggests a degree of certainty greater than that moral certainty which can be reached upon such evidence as is securable in courts of justice. If the learned judge of the court below had stricken out the word "absolute" we certainly could not have held that it was error on his part. It follows that it was not error to decline to give the instruction as it was presented.

Judgment and order affirmed.

64 Cal. 443

HALL

v.

RICE, Adm'r, etc., and others.

Filed January 17, 1884.

The dismissal "without prejudice," by the probate court, of a petition praying that an administrator be compelled to convey certain land, gives the superior court jurisdiction, and it is not for the superior court to inquire what reasons the probate court gave for dismissing the petition. Otherwise, the party demanding a conveyance would be without remedy, since he cannot appeal from the order of the probate court.

The insertion of the name of *Thomas Heptum* in a bond for a deed signed by *Thomas Hepburn* is immaterial.

Department 1.

J. Lambert, for respondent.

W. B. Treadwell, for appellants.

BY THE COURT. 1. We think the insertion of the name "Thomas Heptum" in the bond for a deed signed by *Thomas Hepburn* is immaterial.

2. The superior court had jurisdiction of this action, which is, in effect, a suit in equity for specific performance of a contract for the sale and purchase of lands. Const. art. 6, § 5. Whether the legislature did or did not have power to enact sections 1595-1607 of the Code of Civil Procedure, the plaintiff herein alleged, and the court below found, that the plaintiff's petition, presented as provided in section 1592, was by the probate court "dismissed without prejudice," and this action was brought within six months after such dismissal. The probate court had jurisdiction, if the provisions of the Code are valid, to dismiss the plaintiff's petition "without prejudice," etc. The fact of such dismissal of a petition praying that the administrator be compelled to convey the same land described in the complaint herein, gave the superior court jurisdiction, even if it be admitted its jurisdiction depended upon any previous action of the probate court. It must be presumed the dismissal was on the ground of the dubiety of the right. The jurisdiction of the superior court cannot depend upon the *correctness* of the action of the probate court in holding that the right of the petitioner was *doubtful*. If so, the superior court can never assume jurisdiction of such an action. It is not for the superior court to inquire what reason the probate court gave for dismissing the petition. Ought the superior court to have held that the "facts and circumstances" were not examined by the probate court, and could not have been, because the order of dismissal followed upon an order sustaining a demurrer to the petition, and therefore that the order of

the probate court is void, and the petition is still pending in that court? It was not intended that the superior court should go behind the order of the probate court dismissing the petition without prejudice.¹

3. There was evidence to sustain the finding that the bond was delivered during the life-time of Hepburn.

4. We think the court did not err in allowing the formal amendment to the complaint. The bill of exceptions recites that "no evidence" was given whether the sum mentioned was a fair, just, and adequate consideration for the land. But this must, of course, mean evidence other than the contract itself. The agreement by one not claimed to be otherwise than mentally competent to protect his own interests, is evidence from which the court would be justified in concluding that the consideration was fair and adequate, nothing being proved to create suspicion that it was insufficient.

Judgment and order affirmed.

2 Cal. Unrep. 239

JONES and others

v.

MEYER.

Filed January 17, 1884.

The evidence herein sustains the finding objected to, and substantially responds to the issue.

Department 1.

Becknell & White, for respondent.

Smith, Brown & Hutton, for appellants.

McKINSTRY, J. Appellant contends that finding 1, that defendant "refused to allow plaintiffs to reject 100 sheep from the band of sheep numbering about 2,000 *that he offered to deliver to plaintiffs*," does not respond to the issue, which was: Did defendant offer to deliver 2,000 sheep, permitting plaintiffs to reject 100 of them? But the court found that he offered to deliver a band of sheep, and he refused to allow plaintiffs to reject 100 of these so offered. And there was evidence to sustain the finding. The witness Collom testified: "The defendant had a band of sheep there *that he alleged to be two thousand*

¹ Expunged by the court. See 2 P. 889.

in number, which he offered to deliver to us, but refused to allow us to reject one hundred of the number," etc.

Judgment and order affirmed.

We concur: McKEE, J.; ROSS, J.

64 Cal. 442

REYNOLDS

v.

LYNCH.

Filed January 17, 1884.

In the absence of an averment that the defendants, other than the trustee, are asserting some claim by reason of having joined in the trust conveyance, the complaint contains no cause of action against them. The averment that they are tenants at will of the trustee does not of itself make them proper or necessary defendants.

Department 1.

John Reynolds, in propria persona, for appellant.

J. H. McKerne and Freeman & Bates, for respondent.

BY THE COURT. The greatest scope of relief to which plaintiff would be entitled, as against the surviving trustee, would include a conveyance to plaintiff of the legal estate in the lands (the subject of the trust) which his assignors had when the trust was created. Assuming the fact to be, as alleged in the complaint, that the assignors of plaintiff were owners in fee of all the lands when the deed of trust was executed, and that the assignors of defendants had no right, title, or interest therein,—a fact which is *admitted* by the demurrer,—the complaint contains no statement of a cause of action against the defendants other than Lynch, in the absence of an averment that they are asserting some claim by reason of having joined in the execution of the trust conveyance. The plaintiff omits to allege such assertion of claim, but avers that the defendants, in possession of portions of the same, as *he is advised* and believes, are tenants at will of Lynch, the trustee. If the matter pleaded, as last stated, be sufficiently averred, it does not, of itself, make the defendants in possession proper or necessary parties. Their tenancy at will may, of course, be terminated by plaintiff when a conveyance is obtained from the trustee. It is not pretended that they claim anything except as tenants at will of the trustee.

Judgment affirmed.

Cal.Rep. 1-4 P.—5

64 Cal. 447

BOREL

v.

DONOHUE.

Filed January 17, 1884.

A description in a mortgage of "nine lots in block 113, as per map of Clinton, *said property* being now in possession of the mortgagor," is not a sufficient designation of the land to support a decree of foreclosure.

Department 1.

H. A. Leake, for respondent.

R. P. Wright and *S. J. Jonasson*, for appellant.

BY THE COURT. The description inserted in the deed of mortgage, a copy whereof is annexed to the complaint, is as follows: "All of his" (the mortgagor's, present defendant's) "right, title, and interest in and to nine lots of land in block number one hundred and thirteen, as per map of Clinton; *said property* being now in possession of said party of the first part." (Mortgagor.)

The complaint alleges "that the premises described in said mortgage, and which were in possession of said Michael Donohoe at the time of the execution of said mortgage, are more particularly described as follows: 'All those certain lots or parcels of land situated in the city of Oakland, county of Alameda and state of California, bounded and described together in one parcel as follows.'" (Then comes a description by metes and bounds.)

There is no pretense that there was any mistake in drafting the mortgage, nor is there any prayer for a reformation of the instrument. It is plain that the mortgage contains no description of land, if the words "as per map of Clinton" be eliminated therefrom. If these words relate to a map in which *blocks* are numbered, but which contains no designation of *lots*, the mortgage and map contain no description of lands, unless the description was assisted by evidence that when the mortgage was executed the mortgagor was in possession of certain nine lots within the block 113, as laid down on the map. But the averment and finding is only that at that date defendant and mortgagor were in possession of a certain tract of land. It is not even alleged or found that the general tract included nine lots, or any lots, in block 113. Unless, therefore, the instrument is to be read as mortgaging any and all lands of which the mortgagor was in possession, the decree of foreclosure cannot stand. But the language will not bear such construction.

Judgment and order reversed, and cause remanded to the court below for further proceedings.

64 Cal. 446

RANKIN and others

v.

EKEL and others.

Filed January 17, 1884.

A constable cannot attach and sell the property of a third person without incurring liability to him, by selling only the "right, title, and interest therein" of the defendant in the action, and trespass will lie against the sheriff for an unlawful sale of personal property, without any removal of it.

Department 1.

Eagan & Armstrong, for appellants.*Blanchard & Brown*, for respondents.

By THE COURT. It clearly appeared that the corporation defendant in the attachment suits had no interest in the property when the same was sold by the constable. The court erred in holding and instructing the jury that a constable may attach and sell the property of a third person without incurring any liability to such third person, provided he attaches and sells only "the right, title, and interest" of the defendant in the action. If a defendant has no leviable interest in property, the purchaser at a constable's sale will acquire no interest. But it by no means follows that an officer can protect himself for interfering with the property of a third person by the plea that he only attached and sold the "interest" of a judgment debtor; and, as the judgment debtor had no interest, no harm was done to such owner of the property. Trespass will lie against a sheriff for any unlawful interference with personal property, as for a sale of it, without any removal. *Neff v. Thompson*, 8 Barb. 215. A new trial must be ordered. It is not necessary to decide whether defendants would have been authorized to prove, by way of mitigation of damages, that the property was, subsequent to the constable's sale, sold for taxes and removed by the purchaser at said last sale.

Order reversed, and cause remanded for a new trial.

2 Cal. Unrep. 240

BURTON

v.

NICHOLS.

Filed January 17, 1884.

Where the evidence is conflicting, the finding of the trial court thereon will not be disturbed.

Department 1.

Chas. Fernald, for respondent.*C. A. Thompson and W. C. Stratton*, for appellants.

BY THE COURT. The only point made by appellant is that the evidence does not justify the finding that the lands described in the complaint are not situated within the boundaries of the rancho *Jesus Maria* as patented by the United States. The testimony of the witnesses called by the defendant at least created a substantial conflict with reference to the location of the demanded premises, and we cannot say that the evidence did not sustain the finding of the court.

Judgment affirmed.

HARDWICK

v.

TYRRELL.

Filed January 17, 1884.

The finding herein is sustained by the evidence, and responds to the issue.

Department 1.

York & Whitworth, for appellant.*Miller & Smith*, for respondent.

BY THE COURT. As the complainant alleges the ownership of the property by plaintiff prior to the lease or transfer to Turner, the finding that the latter purchased the property from plaintiff in the month of May, 1879, for \$1,200, etc., and that from the date of said purchase until the taking of the same by attachment the property remained in

Turner's possession "by virtue of such purchase," responds to the material issue. The evidence sustains the finding. The actual transaction, if we are to believe some of the witnesses, was a sale by plaintiff and purchase by Turner as found by the court.

Judgment and order affirmed.

HODGDON

v.

UNDERHILL.

Filed January 17, 1884.

Department 1.

L. S. Taylor, O'Brien & Hodgdon, and Mat. F. Johnson, for appellant.

J. B. Devon, for respondent.

BY THE COURT. The appeal is by plaintiff from a judgment in favor of the defendant Rock. The findings do not show that plaintiff ever had title to or any estate in the lands of which defendant Rock has had possession.

Judgment affirmed.

2 Cal. Unrep. 238

SAN DIEGO CO.

v.

C. S. R. Co.

Filed January 16, 1884.

District attorneys are not authorized to commence and prosecute actions for the recovery of delinquent taxes. Any county may do so in its own name, and its action is to be directed by the board of supervisors of such county.

The district attorney having brought this action without their direction or ratification, no attorney's fees can be recovered of the defendant, nor costs against the plaintiff.

Department 2.

W. J. Hunsaker and W. M. Smith, for appellant.

H. E. Cooper and M. A. Luce, for respondent.

v.1,no.6—57

SHARPSTEIN, J. District attorneys are not expressly authorized by any law of this state to which our attention has been directed to commence and prosecute actions for the recovery of delinquent taxes. By the act of April 23, 1880, (St. 1880, p. 136,) any county is authorized to sue in its own name for the recovery of delinquent taxes, and a form of complaint is prescribed. But no officer or board of officers is expressly authorized to commence the action, and unless the power to do so is within the general powers of some officer or board of officers, we must treat it as a *casus omissus*. It is clearly not within the enumerated duties of district attorneys. Article 8, Political Code. The powers of boards of supervisors are much broader. They have the power "to supervise the official conduct of all county officers * * * charged with assessing, collecting," etc., "of the public revenue," (Political Code, 4046;) "to direct and control the prosecution and defense of all suits to which the county is a party," (Id. subd. 15,) and "to do and perform all other acts and things required by law not in this title (Id. pt. 4) enumerated, or which may be necessary to the full discharge of the duties of the chief executive authority of the county government." Id. subd. 26. This, in our opinion, confers power upon boards of supervisors to direct the commencement and prosecution of actions for the recovery of delinquent taxes, and we think no one is authorized to commence such an action until directed to do so by the board of supervisors of the proper county. And as the court found that the board of supervisors never directed or authorized the institution or prosecution of this suit, or ratified the action of the district attorney in bringing the same, it necessarily results that no attorney's fees can be recovered of the defendant, nor costs against the plaintiff.

The judgment, therefore, must be reversed, and the court below is directed to dismiss the action.

We concur: MYRICK, J.; THORNTON, J.

CALIFORNIA REPORTER

2 PACIFIC REPORTER

SUPREME COURT OF CALIFORNIA

64 Cal. 456

JONES v. SNOW and others.

Filed January 19, 1884.

Evidence of an agreement as to the mode of payment of a promissory note, which agreement does not vary in any manner the terms of the contract as embodied by the note, is admissible under the defense of payment; and, when offered in connection with the testimony tending to show the actual payment of part of the note, it is error to exclude it.

A promise may be a consideration for a promise, and where a promise of money is made for doing a certain act, the performance of which is not promised, yet, if it is performed, the plea of *nudum pactum* is not available in a court of law.

Where certain payments are allowed by the court, we cannot include in such payments an amount, the consideration of which was excluded in the court below.

Department 2.

Robt. W. Scott, for respondent.

T. C. Van Ness and Gardner & Stephenson, for appellants.

THORNTON, J. This action was brought by the assignee of the payee on a promissory note dated January 20, 1880, for \$1,078.20, payable one day after date, without grace, with interest at the rate of $1\frac{1}{4}$ per cent. per month until paid. The defendants, who are the makers of the note, pleaded payment in full before its assignment, which assignment was made after its maturity. Judgment was rendered for plaintiff for \$570.50, and costs, whereupon defendants moved for a new trial, which was denied. Defendants thereupon appealed from the order denying their motion, and from the judgment.

A bill of exceptions found in the record shows that the plaintiff made out a *prima facie* case, whereupon the defendants, to establish their plea of payment, offered in evidence the deposition of defendant, H. W. Snow, regularly taken, to which plaintiff's counsel objected on the ground that it was irrelevant and immaterial, and on the further ground that the answers were evasive. The court admitted the deposition in evidence, with the exception of what follows here: "*Question.* State what, if any, payments you made upon that note. To which witness answered: When the second note was given [meaning the note on which this action was brought] it was agreed between Jones and myself that I should pay the interest and such principal as I could by orders on me, and by paying the premium due from Jones on certain insurance policies. This I did by paying orders drawn on me by Jones, and paying premiums upon insurance policies held by Jones. The total amount of payments so made by me was \$522.47."

This ruling is assigned for error, and we are of opinion that the point is well taken. We cannot see by what canon of evidence the ruling could be sustained. It did not in any manner vary the contract as embodied in the note. The note in all its terms was admitted by it as existing, and effectually binding the makers. It was not offered to show that the payment of the note was to be postponed until it was made in the way stated in the agreement. It was offered in connection with testimony tending to show actual payment of \$522.47. The agreement was made with Jones, the payee, and was substantially this: That payments made in the mode designated should be regarded as payments made on the note, as long as the note remained unpaid and under the control of Jones, the payee and assignor of the plaintiff. Without such agreement, the sums making up the \$522.47, when disbursed, even at the request of Jones, the payee, only created the relation of debtor and creditor, and did not constitute, as between the payee and defendants, payments on the note. In an action brought against defendants by the payee, they might have been set up as a counter-claim; and if they might have been set up in the same manner against the plaintiff they were not so pleaded. But they were admissible in evidence under the defense of payment, and ruling them out was error.

But it is urged that, as there was no proof that they were made before assignment to the plaintiff, there should be no reversal. We cannot concur in this view. The very ground on which they could be sustained as payments, viz., the agreement, was put out of the case by the ruling of the court below, and proving that they were made at any time would not have sustained the plea of payment, for the reasons above given.

It is further urged that the agreement was void by reason of want of consideration. This we do not admit, for there was promise for promise; but conceding that the agreement was in its inception without consideration, Jones had the benefit of it when the money was paid by Snow, and ought not now to be heard to say that there was no consideration. If A. proposes to B. that if he will render a certain service for him in a given period he will pay him a sum of money, and B. makes no promise to render it, yet if he does render the service within the period we do not think that A.'s plea of *nudum pactum* would or should receive much consideration in a court of law.

A still further contention is put forth why there should be no reversal. It is said that the court allowed payments amounting to \$930; and as every intendment must be made to sustain the rulings of the court *a quo*, therefore it must be presumed in this court that the \$522.47 were included in the sum allowed. But we are powerless to presume anything which would contradict the record; and as the record shows that these payments were excluded from its consideration by the court, we could hardly be justified in presuming that they cut any figure in the conclusions reached by it. We should

go far astray to hold that the trial court, in making up its judgment, considered evidence which it excluded.

It follows from the above that the judgment and order must be reversed, and the cause remanded for a new trial; and it is so ordered.

We concur: MYRICK, J.; SHARPSTEIN, J.

64 Cal. 448

DREYFUSS v. TOMPKINS.

Filed January 19, 1884.

Where, in an action against a sheriff for attaching and levying upon the plaintiff's goods, an instruction is asked for, containing recitals of the service of notice, and of the writs of attachment and execution, such instruction is properly refused; the recitals in no way aiding the jury to determine the question of the delivery and change of possession of the goods which are the subject of this action.

Department 1.

J. M. Walling, for respondent.

Cross & Simonds, for appellant.

McKINSTRY, J. There was evidence to sustain the finding of the jury that there was an actual delivery and continued change of possession, from Phillips to plaintiff, of the personal property, the subject of this action.

The court did not err in refusing the instruction asked by defendant. The instruction purports to recite hypothetically the material facts which tended to prove that there was no actual delivery and continued change of possession of the property attached, and which were to be considered by the jury in determining the question of actual delivery and continued change of possession. It recites, among other things, "and" (defendant, sheriff) "did garnish said Dreyfuss by delivering to said Dreyfuss a true copy of said writ of attachment, together with a notification indorsed thereon, notifying him that all moneys, goods, effects, and credits, debts due or owing, or any other personal property *in his possession or under his control*, belonging to said Phillips, were attached," etc., and also that defendant, "under and by virtue of said writ of *execution*, levied upon, seized, and took into his possession said goods, wares, and merchandise, by *delivering to said Dreyfuss a true copy* of said writ of execution." The notification to Dreyfuss, served with a copy of the attachment, so far as such service would prove anything, would tend to prove that defendant *believed* that Dreyfuss had the property in his possession or under his

control. It is certain that the service of the notice, or of the writs of attachment and execution, would not, in any degree, aid the jury in ascertaining whether there had been an actual delivery and continued change of possession. An instruction containing the recitals referred to was therefore properly refused.

Judgment and order affirmed.

We concur: McKEE, J.; ROSS, J.

64 Cal. 455

ANDERSON v. HANCOCK.

Filed January 19, 1884.

Where a tax deed does not recite the recital of the certificate, in regard to the time the purchaser is entitled to a deed, the deed is void.

The only question which the former appeal has made the "law of the case" is that the tax deed in question contains no sufficient description of any lands.

Department 1.

C. A. C. Rowell and *H. W. Willis*, for respondent.

Satlerwhite & Curtiss, for appellant.

BY THE COURT. It is contended by respondent that the decision of this court on the former appeal, (61 Cal. 88,) that there is a sufficient description of land in the tax deed on which plaintiff and respondent relies, is a conclusive determination of the validity of the deed, (so far as this action is concerned,) and is the "law of the case;" that, as a consequence, defendant could not avail himself of any objection to the deed at the second trial which he had failed to take at the first trial. It does not appear, either from the report of the decision on the first appeal, or from the transcript now before us, that the objections to the deed taken at the second were, in fact, taken at the first trial. The only question upon which the former decision is the "law of the case," is the question made at the first trial, to-wit, that the tax deed contained no sufficient description of any lands. The tax deed does not recite the recital in the certificate of sale with reference to the time when the purchaser would be entitled to a deed. The deed is therefore void. *Grimm v. O'Connell*, 54 Cal. 522; *Hubbell v. Campbell*, 56 Cal. 527.

Judgment and order reversed.

2 Cal. Unrep. 241

PHILLIPS *v.* SUTHERLAND.

Filed January 19, 1884.

Where, in an action for the recovery of personal property, the property is not delivered to the plaintiff, he is entitled, if he recover, to a judgment for the property or its value, the value being the value as of the day of trial.

Department 1.

J. J. Jacobs, for respondent.*Atwell & Bradley* and *P. D. Wigginton*, for appellant.

McKINSTRY, J. The action is to recover the possession of specific personal property. The property not having been delivered to plaintiff, the court properly found its value, and the judgment was in the alternative, for the property, or its value if the property could not be delivered. Code Civil Proc. 667. If plaintiff recover in such an action he is entitled primarily to the *very property*, and the value which he is to receive, instead of the property, is the value as of the day of trial. The money value is a substitute for the property, and the amount can be approximately fixed by ascertaining it as of the date (when the value can be judicially determined) nearest to the time when the property would be delivered. It follows that the error of the court in allowing an unverified amendment to a verified complaint, and in allowing the amendment to be made by defacing the record,—erasing words from and interlining others in the original complaint,—did not injure defendant.

Judgment and order affirmed.

We concur: McKEE, J.; ROSS, J.

64 Cal. 454

SPRINGER and others *v.* SCHUTZ and others.

Filed January 19, 1884.

Where separate submissions are made to arbitration on the part of two defendants and each of two plaintiffs, separate awards should be rendered on the submissions, respectively, and the defendants are not estopped from asserting the invalidity of the award, either by consenting to a common trial or paying the separate sums awarded as damages.

Department 1.

Hart & Hart, for appellant.

Stabler & Bayne, for respondent.

By THE COURT. Four distinct and separate submissions to arbitration were executed by the defendants on the one part, and by each of the plaintiffs on the other. The arbitrators awarded to the plaintiffs, jointly, costs in the amount of \$744. It is clear that it was the duty of the arbitrators to render a separate award on the submissions, respectively, as between defendants and each of the plaintiffs. The only questions are: *First*, is the award as to costs binding because defendants assented to it by consenting to *one trial*, in which the rights of all the present parties were investigated; *second*, did they become liable for the costs by paying to the plaintiffs separately the amount of damages awarded to each. We do not think the defendants are estopped from asserting the invalidity of the award as to costs, (on the ground that no authority for such an award was conferred by any or all of the several submissions,) either by consenting to a common trial or by paying the separate sums awarded as damages.

Judgment affirmed.

64 Cal. 450

HUERSTAL v. MUIR.

Filed January 19, 1884.

Ordinarily, a person not a party to the suit, or in privity with the defendant therein, cannot be dispossessed of land by a writ issued upon a judgment for recovery of possession; and where a sheriff finds parties in possession other than those named in the writ, claiming a right of possession, not in privity with the defendant, he may refuse to execute the writ against them. But the court, by virtue of its power over its process, may order its execution against such parties.

Prima facie, all those who come into possession after action brought, come in under the defendant, and they may be evicted, unless they overcome this presumption by a satisfactory showing that they are in possession under a title adverse to that of the defendant. Mere assertion of such a title is not sufficient.

Growing crops are regarded as personal property for some purposes; but, as between a successful plaintiff in ejectment and the evicted defendant, they belong to the realty. If any party have a right to the severed portion of the crop, he has a legal remedy to recover it or its value, but he has no legal right to the restitution of the premises for the purpose of harvesting the crop.

Department 1.

C. Temple Emmet, for respondent and plaintiff.

A. H. Griffith, for appellant.

v.2,no.1—3

McKEE, J. This is an appeal from an order subsequent to judgment. The record of the case shows that Hugh Muir had been dispossessed of a parcel of land in Contra Costa county, by a writ of restitution issued upon a judgment of the late district court of that county, rendered in favor of L. Huerstal against the said Hugh Muir and one William Harding, for recovery of possession of said land and costs of suit. After Muir had been dispossessed by the writ he re-entered upon the land, and in proceedings against him for the re-entry he was adjudged guilty of contempt of court, and punished, and an *alias* writ of restitution was ordered and issued, commanding the sheriff to put the plaintiff in the quiet and peaceful possession of the land. The sheriff executed the writ by again dispossessing Muir; but finding Elizabeth Muir and Peter Baker, parties not named in the writ, in possession,—one asserting adverse right to the land, and the other the crops, partly cut and in part standing on the land,—he made a "requisition" upon the plaintiff to apply to the court for an order for his protection in executing the writ against those persons. And upon motion of the plaintiff's attorney, based upon an affidavit of the plaintiff, the court ordered said Elizabeth Muir and Peter Baker to show cause why they should not be ejected from said premises, and why the plaintiff should not be put in possession of the crop. Upon their answers the court made the following order: "It is ordered that an *alias* writ issue upon the judgment herein, to put the plaintiff in the possession of the land in said judgment described; that the said sheriff is hereby instructed and directed, under the same, to remove from off said lands the said Hugh Muir and his wife, the said Elizabeth Muir, and his family, and give the plaintiff the full possession of said lands, and every part thereof, as against them and each of them; that said sheriff under said writ deliver to the plaintiff herein the crop of hay taken under the said first-mentioned writ.

Appellants attack the order as erroneous on two grounds: (1) Because it was made in a proceeding which was not authorized by law; (2) because a writ of restitution cannot be enforced against persons in possession of the lands who are not named in the writ, nor were parties to the judgment upon which it was issued. It is true, as a general rule, that one who is not a party to the action, or privy to the defendant therein, cannot be dispossessed of land by a writ issued upon a judgment for recovery of possession. In *Tervis v. Ellis*, 25 Cal. 515, where a plaintiff in possession of land applied for an injunction to restrain a sheriff from turning him out of possession under a writ of restitution, issued upon a judgment to which he was not a party or privy, the supreme court denied his right to an injunction, upon the grounds that he had no relation to the writ of restitution, nor the writ to him; * * * and "if the sheriff should interfere with his possession, the writ would not only fail as a justification, but would be pertinent to convict the sheriff of an act of official oppression." When, therefore, a sheriff is called upon to exe-

cute such a writ, if he finds other persons in possession than those named in the writ, who claim that they are rightfully in possession, not in privity with the defendant, and the circumstances are such that a reasonable doubt exists whether the sheriff has a right to turn them out, the sheriff may refuse to execute the writ against them. *Long v. Neville*, 36 Cal. 455. But the court from which the writ issued, may, by virtue of its power over its process, order the sheriff to execute the writ against such persons. And on the hearing of a motion upon notice to them for such an order, the court will act upon the presumption that they entered into possession under the defendant, unless they overcome the presumption by reasonably satisfactory proof, by affidavits or evidence, of an adverse title to that of the plaintiff in the judgment. *Leese v. Clarke*, 29 Cal. 664. "*Prima facie*, all who come into possession after action brought must go out; for the presumption is, nothing to the contrary appearing, that they came in under the defendant; but this *prima facie* case is rebutted when it appears that some person other than the defendant is in possession *under a title adverse to his*; for the right to the possession flowing from such a title has not been determined by the judgment." *Long v. Neville*, 29 Cal. 136.

In the proceedings under review, appellants offered no testimony tending to show an adverse title to the land. Baker claimed none, and Elizabeth Muir, upon her answer to the order to show cause, offered no evidence of an adverse title in herself. By her answer she admitted that she was the wife of the defendant, Hugh Muir; asserted that she was on the premises in possession of the same at the commencement of the action, to which she was not made a party; that she had not entered into possession under her husband, or any of the defendants to the action; and that "she was, at the time of the execution of said writ by the sheriff, and is now, in possession of the said premises in her own right." Conceding that that was a sufficient allegation of a claim of title to the land, it was not proved, nor attempted to be proved. The mere assertion of such a claim is no evidence of the title, if any, upon which it is founded. Being in possession at the commencement of the action as the wife of the defendant, the presumption is, in the absence of proof of a separate property in her, that she was in possession under her husband; and, being in under him, she must go out with him. The plaintiff cannot enforce his judgment otherwise than against the defendant and his family in possession. *Valencia v. Couch*, 32 Cal. 339; *Skinner v. Beatty*, 16 Cal. 156; *Gray v. Nunan*, 11 Pac. C. L. J. 108; *Saunders v. Webber*, 39 Cal. 287.

In his answer Baker averred that at the time of the execution of the first writ he was on the land harvesting the standing crop of hay, as mortgagee of the defendant, Hugh Muir, under a chattel mortgage, which had been executed and delivered to him in February, 1881, and which entitled him to the crop as personal property. The

crop was partly cut and partly uncut, and while in the act of harvesting, the sheriff executed the writ, removed him from possession, and placed the plaintiff in possession of the land and crop; therefore, he asked restitution of the premises for the purpose of harvesting the crop. But, having entered as mortgagee of the defendant *pendente lite*, he was bound by the judgment and removable by the writ; and as he was in fact removed, and the plaintiff was put in possession, the latter was lawfully in possession, not only of the land described in the writ, but of all fixtures and improvements attached to the premises, and to all crops growing or standing thereon. For some purposes growing crops are regarded as personal property; but, as between the successful plaintiff in an action of ejectment and the evicted defendant, they are part of the realty. *Ad. Ej.* 347; *Brothers v. Hurdle*, 10 *Ired. Law*, 490; *King v. Fowler*, 14 *Pick.* 238; *Strode v. Swim*, 1 *A. K. Marsh.* 366. How much, if any portion, of the crop had been made chattel by a severance from the soil does not appear, for no testimony upon the subject was offered or given. If he had any right to chattel property wrongfully taken or detained by the sheriff, the plaintiff, or his agent, he had legal remedies of which he could have availed himself to recover the possession or value thereof; but he had no legal right to a restitution of the premises for the purpose of harvesting the crop.

Order affirmed.

We concur: ROSS, J.; MCKINSTRY, J.

5 Cal. Unrep. 741

HYNES *v.* NELSON.

Filed January 19, 1884.

An order of the court, of its own motion, setting aside a verdict, is the equivalent of an order granting a new trial, and is reviewable upon a statement on appeal; but, being a matter within the legal discretion of the trial court, this court will not interfere with it unless abuse of discretion is shown.

Where the uncontradicted evidence in a suit for malicious prosecution tends to show probable cause, and the verdict of the jury is against the instructions of the court, we cannot hold that there was an abuse of discretion in setting it aside.

Department 1.

A. E. Castello, *W. H. Allen*, and *Geo. W. Lewis*, for appellant and plaintiff.

Vrooman & Davis, for respondent.

MCKEE, J. The case in hand arises out of an action for malicious prosecution. There was a verdict for the plaintiff for \$5,000 dam-

ages, which the court, of its own motion set aside under section 622, Code Civil Proc. By the provisions of that section a court is authorized of its own motion, to set aside a verdict "when there has been such a plain disregard by the jury of the instructions of the court, or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of the instructions, or under the influence of passion or prejudice." The order made in the exercise of that power is reviewable, upon a statement on appeal, in the same manner as an order made on motion for a new trial. An order *ex mero motu*, vacating a verdict, is therefore the equivalent of an order granting a new trial; and, as either is a matter within the legal discretion of the court that makes the order, this court will not interfere with it unless the circumstances of the case, and the principle of law applicable to them, show that there has been an abuse of discretion. It appears by the order entered that the verdict was set aside because it "was not supported by the evidence given on the trial," and because it "was contrary to the instructions of the court given to the jury." Either of these was good ground for setting the verdict aside, and the presumption is in favor of the ruling of the court.

The controlling questions in the case were the existence of malice in the prosecutor, and want of probable cause for the prosecution complained of. It was necessary for the plaintiff to prove each of these things in order to recover. But the primary question was, whether the prosecution was with or without probable cause. *Grant v. Moore*, 29 Cal. 644. That was a mixed question of law and fact: of fact, for the jury, if there was a conflict of evidence, under proper instructions by the court; and of law, for the court, if the underlying facts were admitted or uncontroverted. *Potter v. Seal*, 8 Cal. 217; *Harkrader v. Moore*, 44 Cal. 144; *Anderson v. Coleman*, 53 Cal. 188.

To prove a want of probable cause, it appears, by the statement on appeal, the plaintiff gave proof of the circumstances of the prosecution, of her arrest and imprisonment under it for five days, and of the dismissal of the charge against her on motion of the district attorney; and in giving testimony in her own behalf she stated, "There was no foundation in fact for the charge made against me." To rebut that evidence the defendant called a witness who gave testimony tending to prove the truth of the charge, and that she had given to defendant information of all the facts within her knowledge as to the truth of it. Her statements the defendant testified he believed, and that believing them he fully and fairly laid them, "just as the witness told him," before his own counsel and the district attorney of the county; and that, acting under the advice of his counsel, he had the plaintiff arrested for the offense complained of, and appeared in court to testify against her; but the district attorney dismissed the case, without his procurement or consent, and without the examination of any witnesses. This testimony of the defendant appears to have been uncontroverted, and with reference to it the court

instructed the jury that if the defendant, from the information given to him, believed that the plaintiff was threatening, or about to commit, a crime against him, "and, acting upon that belief, consulted his counsel, and his counsel advised him that it was a crime, and that he might and ought to have her arrested, and if, acting on that advice, and upon his belief that she was the person, he caused this warrant to be issued and this arrest to be made, then if you find these facts to be true, that would in law constitute probable cause." That was the law of the question, (*Harkrader v. Moore, supra; Anderson v. Coleman, supra,*) and the jurors were bound to take it as the law from the court and apply it to the facts in the case. If the defendant had probable cause the plaintiff was not entitled to recover, and as the verdict appeared to the court contrary to its instruction, we are not prepared to say there was error or abuse of discretion in setting it aside *ex mero motu*. It is the duty of a court to set aside a perverse verdict.

Order affirmed.

We concur in the judgment: McKINSTRY, J.; ROSS, J.

Cal. Unrep. 244

CALIFORNIA SOUTHERN R. CO. v. COLTON LAND & WATER CO.

Filed January 19, 1884

The averments herein show sufficiently that the defendant was properly named, and was the known owner and claimant of the land sought to be condemned. A demurrer, therefore, on the ground that these facts did not appear, as required, was properly overruled.

The compensation for land taken under condemnation proceedings is the value of it at the time of trial, and not at the date of the summons, as prescribed in section 1249, Code Civil Proc.

Department 1.

Byron Waters and *H. E. Cooper*, for plaintiff and respondent.

J. A. Gibson and *J. O. Bethune*, for defendant and appellant.

McKEE, J. It is contended that the court below erred (1) in overruling the demurrer to the complaint in the proceeding; and (2) in excluding evidence, offered by the defendant, to prove the value of the land in controversy at the time of the trial. The object of the proceeding was condemnation of a strip of land for the right of way for a railroad. By a general demurrer the defendant objected that the complaint did not contain facts sufficient to entitle the plaintiff to exercise the right of eminent domain, because, as was urged

on the argument, it did not contain "the names of all owners and claimants of the property, if known, or a statement that they were unknown," as required by subdivision 2, § 1244, Code Civil Proc. But the complaint contains the name of the defendant as a corporation duly organized and acting under the laws of the state of California, and the following allegations: "That plaintiff is constructing a railroad from the said National City northward to a connection with the railroad of the Atlantic & Pacific Railroad Company at or near the thirty-fifth parallel of north latitude, in the state of California; that in the construction, maintenance, and operation of its railroad the plaintiff needs, and by this action seeks to acquire, a right of way one hundred feet in width, through the lands of the defendant; said right of way being more particularly described as follows: Being a strip of land one hundred feet in width, located and included between lines on each side of, parallel to, and fifty feet distant from the center line of location of plaintiff's railroad, as the same is located through the lands of the defendant; said center line being located as follows," etc. These averments sufficiently show that the defendant was properly named, and that it was the known owner and claimant of the land which plaintiff sought to condemn for the right of way in the construction of its road. There was, therefore, no error in overruling the demurrer.

Under section 1248, Code Civil Proc., testimony was taken in the proceeding on June 23, 1883,—more than five months after the date of the summons issued in the proceeding. At the taking of testimony the defendant offered to prove, by witnesses then present, the value of the land proposed to be condemned at that time. To this offer plaintiff's counsel objected, on the ground that the date of the summons was the date at which the value must be estimated. The court sustained the objection, and, on submitting the case to the jury, at plaintiff's request instructed the jury as follows: "The jury are instructed that the actual market value of the property sought to be condemned on the day of issuing the summons, (which in this case was the fourth day of January, 1883,) is the amount of compensation to be assessed for the property to be taken, irrespective of prospective or speculative value." The rulings of the court were doubtless based upon section 1249, Code Civil Proc. That section declares that, "for the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected," etc. But by the constitution of 1879 it is provided that "private property shall not be taken * * * for public use without just compensation having been first made to, or paid into court for, the owner; and no right of way shall be appropriated to the use of any corporation, other than municipal, until full compensation be first made in money, or

ascertained and paid into court for the owner." Section 14, art. 1, Const.

Ascertainment of compensation for land proposed to be taken for public use, or "appropriated for a right of way," is therefore the constitutional rule. The assessment of such compensation is concomitant with the right to take, and payment of the sum assessed, with the actual taking or appropriation. Upon assessment being made according to law, the right to take may be exercised. Then the obligation to pay arises, and must be performed within 30 days after the date of the assessment, else the proceeding is annullable, (section 1252, Code Civil Proc.,) and upon payment the property of the owner passes to the public use. One of the principal objects of condemnatory proceedings is the ascertainment and assessment of such compensation; and the chief element in the compensation is the value of the land required by the public necessity. Upon proof of that necessity, the value, according to the constitutional requirement, must be ascertained at the time of making the assessment, for up to the moment of making the assessment the land, or its equivalent value, belongs to the owner; and it is not subject to be taken for public use until the compensation has been first made; the owner is therefore entitled to receive its market value at that time. "The fact to be ascertained," said the late supreme court, in *S. & C. R. Co. v. Galgiani*, 49 Cal. 139, "is the value of the land at the time of the taking." And Mr. Justice SANDERSON says, in *Fox v. W. P. R. Co.* 31 Cal. 556, "it cannot be said in any legal sense that the land has been taken until the act has transpired which divests the title or subjects the land to the servitude. So long as the title remains in the individual, or the land remains unchanged by the servitude, there can have been no taking." "It is a mistake to suppose," says Mr. Justice BALDWIN, in *Bensley v. Mountain Lake Water Co.* 13 Cal. 317, "that any title comes from mere appropriation of another's property, or from the taking of the legal proceeding to condemn it. The constitution is express. Private property shall not be taken for public use without compensation. The compensation precedes the title. The compensation must be adequate. But adequate, when? Of course, when the property is so taken." See, also, *S. F. & S. J. R. Co. v. Mahoney*, 29 Cal. 112, and *C. P. R. Co. v. Pearson*, No. 2,654, not reported. The court below erred in excluding the evidence as to the value of the land at the time of the trial.

Judgment and order reversed, and cause remanded for further proceedings.

We concur: McKINSTRY, J; ROSS, J.

(2 Cal. Unrep. 242)

HARRIS v. CAREAGA.

Filed January 19, 1884.

Where a cause has been referred to a referee, who returns his decision and judgment to the court, the date of their filing, is to legal intent, the date of their rendering, and they have not until then a legal existence upon which a motion for a new trial might be based.

Stipulated statements, notices, or other proceedings, had before the date of such filing, are wholly insufficient as a basis of a motion for a new trial.

Department 1.

Metcalf & Metcalf, for plaintiff and appellant.

R. B. Canfield, for defendant and respondent.

MCKEE, J. The appeal in this case is from an order granting a new trial. The motion for a new trial was heard and determined upon an authenticated statement of the case. At the hearing appellant's attorney objected to the motion, and moved to dismiss it, upon the ground that no notice of it has been given according to law. The objection was overruled. It appears that the case arose out of an action for the dissolution of a partnership and a settlement of the partnership affairs. By an order of the court the case was sent to a referee to take the testimony and an account, and report the same, with his decision and judgment, to the court. On January 9, 1882, the referee, after having taken the testimony and stated an account, which showed a balance due to the plaintiff, prepared his finding of facts and conclusions of law, and a judgment thereon, which he presented with his report to the clerk of the court, to be filed, under the provisions of section 644, Code Civil Proc. But the attorney for the defendant appeared and objected to the filing of the same, and, at the same time, applied to the court for time to prepare and serve objections to the decision and judgment. The court granted him until January 23, 1882, to prepare and file such objections, and ordered the clerk to retain the custody of the report, decision, and judgment, and not to file the same until the further order of the court. Eight months thereafter, namely, on September 8, 1882, the court ordered that the report, decision, and judgment of the referee be filed, and the same were indorsed by the clerk filed on that day. After filing, no notice of intention to move for a new trial was served or filed; but nearly seven months *before* the filing, namely, on February 13, 1882, the defendant served and filed such a notice, and preceded it by service of a document styled "Statement of evidence introduced and proceedings had before the referee herein, with exceptions taken on the trial before him, proposed by defendant to be made part of the report of the referee hereinafter to be filed." And on the twenty-third

day of February, 1882, the attorneys of the parties stipulated in writing to the effect that the statement, with exceptions taken on the trial before the referee, and served February 3, 1882, stand also as a proposed statement on motion for a new trial, and that the motion shall be heard April 25th, unless defendant's attorney shall be absent on that day from the county of Santa Barbara; the plaintiff's attorney "reserving the right to make any legal objection and exception to the proposed statement." On March 13th an extension of time for 30 days from that date was obtained for presentation of the statement for settlement. In fact, however, the statement was not presented until May 1, 1882, and on that day the attorney for the plaintiff objected to the settlement on the ground that the statement had not been presented in time. It was settled, however, over his objections, and, as settled and engrossed, it was ordered to be filed, and was filed on September 8, 1882, with the decision and judgment reported by the referee. On that day the case was considered as tried to a legal intent. *Hastings v. Hastings*, 31 Cal. 95. The decision and judgment were then rendered, and, for the first time, had a legal existence upon which the right to move for a new trial could be put in motion. But the attempt to exercise the right before the decision was ineffectual for any purpose, and the proceedings under it were wholly insufficient as a basis for the motion. In *Mahoney v. Caperton*, 15 Cal. 314, it was so held of a notice of intention given one day before the rendition of the judgment. And in *Plateau v. Lubeck*, 24 Cal. 364, it was held that a stipulated statement could not be made the foundation of a motion for new trial where no notice of intention to move had been served and filed. So, in *Bear River & A. W. & M. Co. v. Boles*, Id. 354, it is said: "Where no notice of intention to move for a new trial is given or waived, the making and filing of a statement does not give the court jurisdiction over the subject-matter of a new trial, and an order granting a new trial will be reversed." To the same effect will be found *Ellsassar v. Hunter*, 26 Cal. 279, and *Calderwood v. Brooks*, 28 Cal. 152.

Order reversed.

We concur in the judgment: McKINSTRY, J.; ROSS, J.

64 Cal. 459

APPELGARTH v. AYBOTT and others.

Filed January 20, 1884.

The protest of a notary is only *prima facie* evidence of the facts contained in it, and evidence to contradict and overcome its recitals is admissible.

To bind the indorsers on a note, it must be presented to the maker at maturity, and no previous statement of intention not to pay at maturity, or other arrangement between the maker and holder, can excuse the non-presentation, so far as the indorsers are concerned, whatever effect it may have as to the maker.

Department 1.

E. J. Jackman, for plaintiff and appellant.

John L. Law, for respondents.

McKEE, J. The question in this case involves the liability of the indorsers of a promissory note. The note upon which the question arises was made in Merced county, and was left in the Merced bank for collection. The president of the bank acted as a notary public. As notary he protested the note, at its maturity, for non-payment, and served notice of its dishonor, by mail, upon each of the indorsers. In his protest he certified that he had demanded "personally, in writing, of the maker, payment of the said note, which was refused." But on his examination as a witness he testified that the note had not been presented at maturity to the maker for payment, nor had payment thereof been demanded. What he had done was to write a letter to the maker of the note on the night of the fourteenth of August, 1879, the day the note became due, demanding of him payment of the same. This letter he inclosed in an envelope addressed to John Appelparth, Brooklyn, California, (the reputed place of residence of the maker,) and mailed it that night, to go by mail the next day. He further testified that two or three days before the maturity of the note the maker of it came to him, as president of the bank, and told him he would not be able to take the note up at maturity. The court found that the note had not been presented at its maturity to the maker for payment, and payment thereof had not been demanded, and that the indorsers were not liable.

Two objections are made to the judgment: (1) That it was error for the court to let the notary contradict and falsify his notarial certificate; (2) that the findings are contrary to the evidence, because the evidence proved that presentment had been excused. The protest of the notary was only *prima facie* evidence of the facts contained in it, (section 795, Pol. Code,) and the admission of evidence to contradict and overcome its recitals was not erroneous. Section 1833, Code Civil Proc. The fact that the maker of the note before its maturity notified the president of the bank in which it was left for

collection that he would not be able to pay it at maturity did not excuse the holder from presenting it for payment in order to charge the indorsers. Non-presentation, under the circumstances, was excused as to the maker himself; and he was not entitled to notice of the dishonor of the note. Section 3156, Civil Code. But no arrangement between the maker and the holder could change the contract of the indorsers so as to affect their rights or liabilities, or to excuse performance of the conditions of the law of their contract, unless they were parties to it, or, on being informed of it, consented to it. Story, Prom. Notes, 291. The question raised has been settled by the supreme court of Massachusetts in *Lee Bank v. Spencer*, 6 Metc. 309. That was a suit against indorsers of a promissory note made payable at the bank. It was not presented to the bank for payment at maturity, because the promisor had formally called on the holders and informed them that it would be useless to present the note at the bank, as he could not pay it. But, said SHAW, C. J., "however this might affect the rights of the promisor, we think it did not alter the conditional obligation of the indorsers, and make them responsible without any presentment whatever." So, in *Pierce v. Whitney*, 29 Me. 188, it was held that the fact that the maker of a note had addressed a letter to the holder informing him that he would not be able to pay it at maturity, and requesting an extension, would be no excuse for non-presentation of the note at its maturity to the maker.

There is no error in the record. Judgment and order affirmed.

We concur: ROSS, J.; MCKINSTRY, J.

(5 Cal. Unrep. 743)

BAILEY v. SLOAN.

Filed January 20, 1884.

A defendant has a statutory right to have the place of trial changed to the county of his residence, and, there being no counter-motion to retain the cause for the convenience of witnesses in the county where it was commenced, the motion should have been granted.

Department 1.

J. W. Freeman, for plaintiff and respondent.

Robt. Harrison, for appellant.

McKEE, J. In the superior court of Kern county the plaintiff commenced an action to recover judgment upon three promissory notes, made and delivered to him in that county by the defendant in the

action. After service of summons, the defendant moved for a change of the place of trial of the action, on the ground that he was, at and before the commencement of the action, a resident of the city and county of San Francisco. The motion was based upon affidavits, which established the fact of defendant's residence in the city and county of San Francisco. The fact was not controverted by the counter-affidavits filed by the plaintiff; nor was any counter-motion made by him to retain the cause in Kern county, on the ground of convenience of witnesses; but the court denied the motion. As the county designated in the complaint was not the proper county for the trial of the action, the defendant had a statutory right to have the place of trial changed to the county of his residence. The order of the court denying the right was therefore erroneous. Sections 395, 397, Code Civil Proc.

Order reversed and cause remanded.

We concur: McKINSTRY, J.; ROSS, J.

PEOPLE'S DITCH CO. v. KING'S RIVER & FRESNO CANAL CO.

Filed January 19, 1884.

Order appealed from affirmed; following 60 Cal. 408.

Department 1.

Brown, Daggett & Jacobs, for respondent.

H. S. Dixon, for defendant and appellant.

BY THE COURT. This case is analogous to the case of *Lower King's River Water Ditch Co. v. King's River & Fresno Canal Co.* 60 Cal. 408, and upon the authority of that case the order appealed from is affirmed.

(2 Cal. Unrep. 240)

In re ESTATE OF CURTIS.

Filed January 19, 1884.

Appeal dismissed, for want of transcript being filed.

Department 1.

Charles F. Hanlon, for respondents.*Freeman & Bates*, for appellant.

BY THE COURT. No transcript on appeal having been filed in this cause, according to the rules and practice of the court, the motion made by respondents G. L. Curtis and W. C. Curtis, to dismiss the appeal from the judgment, is sustained; and as to them the appeal from the judgment is dismissed.

(64 Cal. 463)

MCQUILKIN *v.* CENTRAL PAC. R. Co.

Filed January 22, 1884.

To get off a train on the side where there is no platform, there being a platform on the other, is not *per se* negligence that would warrant a nonsuit. Whether, under the circumstances proved, it was negligence, and an immediately concurring cause to the injury, is a question for the jury.

Evidence that other parties were in the habit of getting off as did the plaintiff, was inadmissible.

The negligence of the plaintiff will prevent a recovery, whether the defendant be negligent or not.

Plaintiff's negligence is a defense to be proved by the defendant.

Department 1.

Z. Montgomery and *Montgomery & Martin*, for plaintiff and respondent.

Cope & Boyd, for defendant and appellant.

BY THE COURT. 1. We cannot say that the court below ought to have granted a nonsuit, on the ground that plaintiff's evidence showed the negligence of the mother of the infant plaintiff proximately contributed to the injury. The position of defendant's counsel is that, where a railroad company has provided a platform on one side of its track, on which passengers may alight, an attempt of a passenger to

get off on the other side is negligence *per se*. We think that the fact, if proved, that the mother of plaintiff attempted to alight on the side where there was no platform, is to be taken in connection with the other physical conditions proved; the question whether she was guilty of contributory negligence to be determined by the jury upon all the evidence bearing on that question. The act or omission on the part of a plaintiff, claimed to have contributed to the injury, must have direct relation to the act or omission charged to be negligence on the part of a defendant. Whether the attempt to get from the platform at the rear of the car to the ground was, under the circumstances proven, negligence, and whether such negligence was, to any extent, an immediately concurring cause of the injury, were matters to be decided by the jury.

The cases cited by appellant do not sustain its position, in view of the facts proved in this case. In *Pennsylvania R. R. v. Zebe*, 33 Pa. St. 318, it appeared that a passenger got off "on the wrong side" and stepped upon another track, where he was injured by a moving train. There was a platform on each side of the tracks within the depot, and trains frequently met at that point. It was said that the passenger who voluntarily got off his car and on the track on the inner side could not recover, in an action against a railroad company, unless there was gross negligence on the part of the latter in permitting the passenger thus to leave the car. The question did not arise upon nonsuit, but upon a request of the trial court to declare the law, or "state the point," that if the plaintiff "voluntarily and negligently" placed himself where he did, when there was a safe mode of exit, and full opportunity to use it, the defendant was not liable as a common carrier. Pages 323, 324. A second judgment for the plaintiff in the same action seems to have been reversed for error in permitting two witnesses to testify that *they* were in the habit of getting off on the same side of the train as did plaintiff. *Id.* 423. It is plain such evidence was inadmissible.

In Michigan it has been held that the mere failure of a railroad company to have a platform on each side of a station is not to be regarded as of itself negligence. There it appeared the plaintiff arrived at a station before the cars came in, and deliberately walked on the side most distant from the platform, etc., and was there injured in attempting to board the train. The court held plaintiff could not be said to have affirmatively proved that she was free from all contributory negligence; by the law of Michigan the burden of proof being on the plaintiff to show that there was no contributory negligence on her part. *Michigan Cent. R. v. Coleman*, 28 Mich. 440. In California contributory negligence is a defense, to be established by defendant, unless the evidence on the part of the plaintiff shall prove a want of reasonable care on his part. *Robinson v. W. P. R. Co.* 48 Cal. 409.

Bancroft v. Boston, etc., R. R. 97 Mass. 275, was a case in which

the plaintiff's intestate was, under the circumstances proved, held guilty of contributory negligence in attempting to cross a track from which he was hurled by an engine.

The English case, *Siner v. Great Western Ry.* L. R. 3 Exch. 150, L. R. 4 Exch. 117, is a case unlike the one at bar in every respect, except that in that case, as in this, the platform was not as long as the train.

2. The court below charged the jury in effect that the plaintiff was entitled to recover, although the evidence showed that her mother was guilty of negligence contributing proximately to the injury, unless the defendant was guiltless of any negligence in a certain particular. The following instruction embodies the idea repeated in other portions of the charge: "If you believe from the evidence that there was, at the time of the injury complained of, a safe platform at Market-street station for the use of passengers in getting on and off the cars, it was the duty of any passenger desiring to leave the train to get off on the platform; and if the mother of the plaintiff disregarded this duty and attempted to get off with the plaintiff on the other side of the train, where there was no platform, and thereby *caused or contributed* to the injury, the action cannot be maintained, and you must find for the defendant, provided you believe from the evidence that the train stopped long enough to enable the mother and child with reasonable diligence to have landed upon the platform." At the trial the plaintiff claimed the defendant was negligent in starting the train too soon, and, as said by counsel for appellant, "the legal proposition embodied in the instruction is that defendant must have been free from negligence in that respect in order to prevent a recovery by reason of the negligence of the mother." But, if the negligence of the mother of plaintiff contributed directly or proximately to the injury, she ought not to have recovered, whatever the negligence of the defendant. It is not giving the defendant the benefit of the rule as to contributory negligence to say that the negligence of the plaintiff, which contributed as a proximate cause to the injury, will prevent a recovery, provided the defendant has not been guilty of negligence.

Judgment and order reversed, and cause remanded for a new trial.

64 Cal. 462

PATRICK v. MORSE.

Filed January 22, 1884.

The transcript not showing that objection was made to hearing the motion for a new trial because it came too late, it will be presumed that the time was extended by the consent of parties.

Department 1.

Irvine & Le Breton, for plaintiff and respondent.

J. B. Hart, for appellant.

BY THE COURT. This is an appeal by defendant from an order granting a new trial. Judgment was ordered in favor of defendant, August 19, 1879. The cause was tried without a jury, and no notice of the decision of the court was given to the plaintiff prior to service by him of notice of intention to move for a new trial on the seventh day of November, 1879. August 29, 1879, plaintiff had, however, served notice of a motion to vacate and set aside the judgment, and the point made by appellant is that the plaintiff's right to move for a new trial expired in 10 days after August 29, 1879, when, as appears by the record, he had actual knowledge of the decision of the court and the entry of judgment thereupon. Section 1054 of the Code of Civil Procedure reads: "When an act to be done, as provided in this Code, relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the preparation of statements or of bills of exceptions, or of amendments thereto, or to the *service of notices* other than of appeal, the time allowed by this Code may be extended, upon good cause shown, by the court in which the action is pending, or the judge thereof; * * * but such extension shall not exceed 30 days, without the consent of the adverse party."

There is nothing in the transcript to show that any objection was made below to the hearing of the motion for new trial on the ground that the motion came too late, and we must presume that the time was extended by consent of the parties.

Order affirmed.

v.2,no.1—4

SUPREME COURT OF CALIFORNIA.

64 Cal. 473

McLAUGHLIN *v.* DEL RE.

Filed January 24, 1884

Where the purpose is to prevent a continuance of trespasses, producing irreparable injury, the remedy is in equity to prevent a multiplicity of suits, pecuniary compensation not affording adequate relief; and in such a suit the issues of fact should be tried by the court unless it see fit to order any or all of them to be submitted to a jury.

Department 1.

J. B. Reddick and Wm. T. Lewis for appellants.

Ira H. Reed for respondent.

McKINSTRY, J. The action is neither to recover specific property; nor for money claimed as due upon contract, or as damages for breach of contract; nor "for injuries" simply. The issues of fact ought, therefore, to have been tried by the court, unless the court saw fit to order any or all of them to be submitted to a jury. Code Civil Proc. 592. The action is in equity, the main purpose of it being to obtain a final decree restraining the continuance or repetition of the trespasses alleged, which are of a character, as claimed, to produce irreparable injury. *Id.* 526. The facts alleged appeal to the court of equity for preventive relief, on the grounds that pecuniary compensation would not afford adequate relief, and that restraint is necessary to prevent multiplicity of suits. Civil Code, 3422.

Judgment and order reversed, and cause remanded with direction to the court below (on the testimony already taken and such further testimony as may be taken under order of the court) to find the facts and enter appropriate judgment thereon.

We concur: McKEE, J.; ROSS, J.

(64 Cal. 473)

PALACHE v. HUNT.

Filed January 24, 1884.

An appeal may be taken to this court from a judgment of a superior court granting or denying a *mandamus*, and an undertaking in the sum of \$300, properly executed, stays the execution of the judgment pending the appeal.

In Bank.

Stanley, Storey & Hayes, for petition.

SHARPSTEIN, J. There is not in the present, nor was there in the late, constitution any provision conferring appellate jurisdiction in cases of *mandamus*, *certiorari*, prohibition, or *quo warranto*. And yet this court has repeatedly exercised such jurisdiction. In *People v. Carman*, 18 Cal. 693, it declined to do so in a case of *certiorari*. But that case was expressly overruled in *Winter v. Fitzpatrick*, 30 Cal. 273, which has since been followed in a large number of cases, a majority of which arose under the late constitution, which, in this respect, did not differ materially from the present one; and we must presume that the framers of the present constitution copied into it the provision of the late one on this subject with knowledge of the interpretation which this court had given to it, and thereby adopted such construction. In other words, this court having repeatedly held that it had appellate jurisdiction in such cases, under the late constitution, the framers of the present constitution, if they had intended to effect a change in that respect, would have made such intention clear. We are therefore of opinion that an appeal may be taken to this court from a judgment of a superior court granting or denying an application for a writ of *mandamus*, and that an undertaking in the sum of \$300, executed and conditioned according to the provisions of section 941, Code Civil Proc., stays the execution of the judgment pending the appeal.

The application for a writ of *mandamus* to compel the court to fix the amount of an additional undertaking to be given by appellants is denied, as the undertaking already filed stayed the execution of the judgment pending the appeal.

We concur: THORNTON, J.; MCKINSTRY, J.; MYRICK, J.; MORRISON, C. J.; MCKEE, J.

Cal. Rep. 1-4 P.—7

(64 Cal. 469)

TIMES PUB. CO. v. COUNTY OF ALAMEDA.

Filed January 25, 1884.

The power of contracting for the county printing is given to the board of supervisors, and not to a county or township officer, and a contract with the supervisors to publish "all notices required to be published by any county or township officer that may be ordered published by the board," includes the delinquent tax-list which the tax collector is required to publish.

Where work is done in performance of a contract, awarded according to law, it is, in legal effect, done by the order of the board of supervisors who let the contract for it, and is a charge upon the county, enforceable according to the terms of the contract.

Department 1.

John Frehane, for appellants.

E. M. Gibson, for respondent.

McKEE, J. Upon declining to amend the complaint in this case, after a demurrer thereto had been sustained by the court, a judgment of dismissal was entered against the plaintiff, from which it has taken this appeal. The complaint contains a complete statement of a cause of action to recover for work done in publishing the delinquent tax-list of the county of Alameda, for the fiscal year 1879-80, in performance of a contract for the county printing alleged to have been awarded to the plaintiff by the board of supervisors. According to the averments of the complaint the contract was "to publish the proceedings of the board of supervisors of said county, the quarterly reports of the auditor and treasurer, all notices required to be published by the board, and all notices that are required to be published by any county or township officer that may be ordered published by the board."

It will be observed that publication of the delinquent tax-list is not, *eo nomine*, enumerated in the contract; therefore it was not provided for, unless it be included within the terms "all notices required to be published by the board," or "all notices that are required to be published by any county or township officer that may be ordered by the board." The question therefore arises, whether the board of supervisors of the county had authority to provide for the publication of the delinquent tax-list of the county, and to contract for its printing and publication.

Sections 3764 and 3765 of the Political Code declare what shall constitute a delinquent tax-list; section 3766 prescribes the mode of its publication; and section 3764 requires the tax collector, in each of the counties of the state other than San Francisco, to make publication of the delinquent tax-list of his county on or before the first

Monday of February of each year. The duty of preparing the delinquent tax-list for publication, and of causing it to be published, therefore, devolved upon the tax collector; but he could not provide for its publication unless it had been let to the lowest bidder by sealed proposals, after ten days' public notice, (section 3766, Pol. Code;) and he had no authority to let such a contract, because the publication was part of the county printing, for which boards of supervisors in their respective counties were authorized to contract. Sub. 21 of section 4046, Id.

It is claimed, however, that as sections 3765 and 3766, Id., required the tax collector to make the publication, he was the proper officer to contract for it according to law. But section 4047 of the same Code declares: "The supervisors must contract for (1) all county printing; (2) all books and stationery; (3) all supplies for county institutions; and all contracts must be made with the lowest bidder, and after 10 days' public notice that such contract will be let. The bidding must be by sealed proposals." This section went into effect on the same day that section 3766, *supra*, took effect, namely, on April 1, 1878. Sections 3766, 4046, and 4047 are therefore *in pari materia*, and should be read together in order to arrive at the intention of the legislature upon the subject to which they relate. Reading them together, it seems to be manifest that the legislature intended to give the power of contracting for the county printing to the boards of supervisors of the respective counties, and not to a county or township officer; and as the publication of the delinquent tax-list of a county is part of the county printing required to be published by the tax collector of the county, it follows that in this instance it was provided for by the contract awarded to the plaintiff. When a contract has been awarded according to law, work required by law to be done in performance of it is in legal effect done by order of the board of supervisors, who let the contract for it, and is a charge against the county, enforceable according to the terms of the contract. Section 3764, Pol. Code.

Judgment reversed and cause remanded; and the court below is directed to overrule the demurrer and permit the defendant to answer.

We concur: ROSS, J.; MCKINSTRY, J.

2 Cal. Unrep. 249

FOWLER v. HEINRATH.

Filed January 25, 1884.

Where there is nothing in the record to show upon what the court acted in dissolving an injunction, the presumption is that it was dissolved upon good cause shown. Moreover, the retention or dissolution of an injunction is within the sound discretion of the court, with which this court will not interfere unless the record shows abuse of discretion.

Department 1.

S. W. Geis, for respondent.

Frank H. Farrar, for appellant.

McKEE, J. The appellant (plaintiff in the court below) commenced an action of ejectment for recovery of possession of a tract of land. In addition to the statement of a cause of action in ejectment, the complaint contained averments to the effect that, at the time of the alleged entry and ouster by the defendants, there was upon the land a crop of grain which had been planted by the plaintiff, a portion of which the defendants, since their entry, had cut and stacked upon the land; that they threatened to cut the remainder, and to remove the entire crop from the premises, and convert it to their own use; and that they were insolvent, and a judgment against them for the value of the grain would be unavailing. The complaint was verified, and upon filing it, together with an injunction bond, conditioned according to law, a temporary injunction was issued restraining the defendants from disposing of, removing, or injuring any of the grain, whether uncut or cut, and stacked upon said premises. But the court afterwards, on motion of the defendants' counsel, and after argument of counsel of the respective parties, dissolved the injunction.

In the record which the plaintiff brings before us, on his appeal from the order, there is no bill of exceptions, no statement on appeal, no papers properly certified or identifiable as the papers used on the hearing of the motion; nothing, indeed, to show upon what the court below acted in the hearing and determination of the motion to dissolve. Assuming that the verified complaint was a sufficient basis upon which to issue the injunction, and that it was properly issued thereon, (*Natoma Water Co. v. Clarkin*, 14 Cal. 544,) yet the court may have had good cause to dissolve it. The court may have been satisfied that the defendants were entirely solvent and able to respond in damages, and that the plaintiff had an adequate remedy at law against them for the recovery of the grain, or for damages for its taking or detention. Upon such a showing the injunction would have been properly dissolved, and the presumption is that the court did dissolve it upon good cause shown. Every intendment is in favor of

the validity of the order. Besides, the order was made upon notice given to dissolve an injunction issued *ex parte*, the retention or dissolution of which is a matter within the sound discretion of the court, and this court cannot interfere with that discretion upon a record which discloses no abuse of discretion.

Order affirmed.

We concur: ROSS, J.; MCKINSTRY, J.

SANTA ANA VALLEY IRRIGATION Co. v. ANAHEIM WATER Co.

Filed January 25, 1884.

Anaheim Water Co. v. Semi-tropic Water Co. followed.

In Bank.

Bicknell & White, Thos. H. Smith, Glassell, Smith & Smith, Howard Brosseau, and Howard, Scott & Montgomery, for respondents.

J. W. Shanklin and Thom & Stephens, for appellants.

BY THE COURT. These appeals are by different parties from the same judgment, and were submitted upon the same record. On the authority of *Anaheim Water Co. v. Semi-tropic Water Co.* 12 Pac. C. Law J. 158, the judgment is reversed, and the cause remanded for a new trial.

64 Cal. 476

WEILL v. BALDWIN and others.

Filed January 26, 1884.

Where adjoining land-owners agree that the waters of a certain stream be taken to a reservoir on the land of one of them, and that the other should conduct half of the water through ditches to his land, these are covenants that run with the land, and the successors of either party have no right to go to a point higher up than where the stream reaches their adjoining lands, and convey the water to his land by some different means, and claim the whole of it for his own use.

Mere non-user of a joint right by one party is no evidence of an adverse use of the right by the other party entitled thereto.

Department 2.

Brunson & Wells, for appellants.

Glassell, Smith & Patton and Smith, Brown & Hutton, for respondent.

MYRICK, J. This controversy is as to the right of the plaintiff to go upon the land of Baldwin and construct and use a ditch to convey water from a reservoir located on Baldwin's land, to and upon the land of plaintiff, for use thereon. The two ranchos, the Santa Anita and the Duarte, are separated by the Saw Pit Canon stream, being located thereon,—the Santa Anita on the west and the Duarte on the east. At the date of the two instruments first herein referred to, plaintiff (Weill) was the owner of the Duarte, and Wolfskill (Baldwin's predecessor) was the owner of the Santa Anita. On the thirtieth of October, 1869, Wolfskill and Weill executed an instrument, reciting the ownership by them respectively of the ranchos; that the stream ran between the two ranchos, coinciding generally with the boundary line; and that they had agreed to use the waters of the stream in common for the purpose of irrigating the ranchos, and for such other purposes as they may desire, respectively, each to have an undivided one-half interest in the use of the said waters; and the parties mutually granted each to the other an undivided one-half of the right, title, and interest of each respectively to the water of the said Saw Pit Canon, to have and to hold by the said parties, respectively, and their heirs and assigns, forever. This instrument was acknowledged and recorded.

On the third of January, 1870, the same parties made another instrument, reciting that, whereas, Wolfskill had, at his own cost, constructed a ditch and aqueduct to conduct the water of the stream to a point on the Santa Anita, and that it was intended and agreed that the parties were and should be equally interested in the ditch and aqueduct, and the use of the water in the arroyo and ditch, therefore, in consideration thereof, and of the payment of \$825, paid by Weill to Wolfskill, being the proper proportion of the cost of the ditch, the said Wolfskill granted, bargained, and sold to Weill the undivided one-half of the ditch and the use thereof from the point where it received the water to the point where it emptied, or should empty, its contents into the reservoir selected for that purpose on the Santa Anita, together with the equal use and enjoyment of the same, and of the water thereof, inclusive of the equal right of way throughout the course of the ditch, for all purposes of use and repair, to an equal extent with said Wolfskill, and no further; and it was in said instrument agreed that at a point in the Santa Anita a reservoir should be constructed to receive the water of the ditch, from which it should be distributed for the equal benefit of both parties, the expense of constructing the reservoir to be equally divided between the parties; and for said consideration Wolfskill granted, bargained, and sold to Weill the right to construct not more than two ditches leading from the reservoir to and upon the Duarte, for the purpose of distributing to his own use and benefit one-half of the water so collected or to be collected in said reservoir; also, the right of way over the Santa Anita for the reasonable purpose of constructing and repairing said

ditches, and using and enjoying the said half of the water of the reservoir. And it was agreed that each did convey to the other such interests and rights that each was and should be equally interested in the use of the waters of the arroyo and the reservoir, and the ditch leading into the reservoir, and should have and enjoy all the reasonable facilities for the preservation of said rights and privileges. This instrument, also, was acknowledged and recorded.

It may be here mentioned that to the north of the ranchos, higher on the stream, was a tract of government land, and in constructing the ditch Wolfskill had gone to a point on the government land about half a mile north of the north line of the ranchos, and had constructed a dam to turn the water of the stream into the ditch, and from that point the ditch led southerly, on the west side of the stream, across the government land, to and upon the Santa Anita. Subsequently one Newark became the owner, and, while the owner, he and said Weill caused to be posted and recorded a notice claiming to appropriate, under the provisions of the Civil Code, all the waters which flow or which might flow in and out of the Saw Pit Canon, as well by reason of prior appropriation as by the cutting and excavating of ditches, erection of flumes, and building of reservoirs, and use of the same, as also by reason of the natural bed of the stream being upon the lands of said ranchos. They also claimed the said water as belonging to the ranchos, and declared that they claimed "all the water which flows or which may hereafter flow down the Saw Pit Canon, and out of the same, to the extent of 196 inches under a four-inch pressure;" that they intended to use the water for domestic, agricultural, irrigating, and manufacturing purposes, and intended to carry and conduct it to, over, and upon the Santa Anita and Duarte ranchos, by means of the flumes, ditches, and aqueducts already erected, cut, and dug for that purpose, and to divert it if necessary by means of similar ditches and flumes, and, if they be not sufficient, then by pipes sufficient to carry that amount of water. Subsequently the defendant Baldwin acquired the title to the Santa Anita rancho, and to the piece of government land above spoken of, through which the stream flows before reaching the north line of the ranchos.

During the rainy season water flowed in the stream down, through, and between the ranchos, but in the dry season it was diminished in quantity, and at times did not reach the line of the ranchos. In order that a larger and continuous supply might be obtained, Baldwin constructed a dam at a point on the stream about a quarter of a mile above the old dam, and constructed a ditch and flume therefrom across the land above spoken of as government, leading to the reservoir on the Santa Anita, repairing and using portions of the old ditch, and constructing new ditch and flume in places. By means of the new dam, and the ditch and flume so constructed and repaired, a continuous supply of water was obtained, and was used by Baldwin on his rancho. Prior to 1882, Weill, having no occasion to use

water, had not attempted to do so; but in March, 1882, he constructed a ditch from the reservoir, to convey water therefrom over the intervening portion of the Santa Anita, to and upon the Duarte. This ditch was filled up and obstructed by the defendants, was twice re-opened by plaintiff, and each time filled up and obstructed by the defendants; and this action was brought to enjoin them from further preventing plaintiff from constructing a ditch from the reservoir, or from taking his share of the water, and to have it adjudged that plaintiff is the owner of an undivided half of the waters, and of the ditch, aqueduct, and reservoir, and of the right of way for two ditches for the purpose of using the waters from the reservoir. The plaintiff had judgment in the court below.

It is not necessary, in this case, to consider any question as to rights of the parties as riparian owners, nor as to the rights of Baldwin to have or use water as owner of the tract of so-called government land; nor is it necessary to determine the effect of the notice of appropriation, further than as a transaction between the then owners of the ranchos regarding their respective rights, duties, and obligations arising under the two instruments which had been previously executed. By these two instruments the owners of the ranchos had covenanted and agreed, as between themselves as such owners, that the waters of the Saw Pit Canon stream should be taken and conveyed to a reservoir on the Santa Anita by ditches and flumes constructed at their joint expense, and that from the reservoir Weill might construct at least two ditches across the Santa Anita, and convey one-half of the water to the Duarte. The covenants contained in these instruments are covenants running with the land; and Baldwin, the successor of one of the contracting parties, could not, by going to a point higher up on the stream, and taking water therefrom and conveying it (even across land not owned by either of the contracting parties) to the Santa Anita rancho, claim the whole of it for his own use. The *water*, so far as the right to its use appertained to either of the two ranchos, was the subject of the contracts, the means of conducting it being secondary; the parties contracted with reference to the use of the waters of the Saw Pit Canon stream. The statute of limitations does not apply. There is no evidence of adverse use until March, 1882. It may be that Baldwin is entitled to recover of plaintiff one-half of the amount necessarily expended, but that matter is not for consideration here, as payment does not appear to have been made by the parties a condition precedent. Baldwin's action in filling up plaintiff's ditch was not based on non-payment.

We have not mentioned in detail all the points presented by appellants; but they are, in effect, disposed of by the conclusion at which we have arrived.

Judgment and order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

64 Cal. 475

WILSON v. BAKER.

Filed January 26, 1884.

The prosecution of a suit in one court cannot be enjoined by another court of co-ordinate jurisdiction in this state.

Department 2.

Roche & Dresbach, for appellant.

W. E. Turner, Schell & Treat, for respondent.

MYRICK, J. This is an appeal from an order made by the superior court of Stanislaus county, enjoining the defendants from taking any further steps in, or proceeding with, or in any manner further prosecuting, the action at law pending in the superior court of the city and county of San Francisco, wherein said defendants are plaintiffs and one Love is defendant. The action against Love is an action brought to recover judgment for an indebtedness of about \$4,000, in which suit an attachment had been issued and levied upon certain personal property. The plaintiff here, Wilson, claims an interest in the attached property under an assignment made by Love to him, for the benefit of Love's creditors, which assignment, he alleges, was made in pursuance of an arrangement between all the creditors, including the defendants herein, by which the property was to be released from the attachment, and disposed of for the mutual benefit of the creditors. It is the settled law of this state that the prosecution of a suit in one court cannot be enjoined by another court of co-ordinate jurisdiction. Exception to this rule has been suggested, in case the court, in which the proceedings sought to be enjoined are pending, cannot afford adequate relief. The case before us is not within the exception. Under the statutes of this state, (sections 385, 387, 389, Code Civil Proc.,) Wilson, if he had the right to have the action against Love stayed, could have obtained the relief in the court in which that action is pending.

The order is reversed.

We concur: THORNTON, J.; SHARPSTEIN, J.

64 Cal. 481

CITY AND COUNTY OF SAN FRANCISCO *v.* LUX and another, Ex'rs, etc.

Filed January 28, 1884.

A general deposit in a bank is in effect a loan, the relation between the bank and the depositor being that of debtor and creditor.

Where bank credits belong to the estate of a deceased person, their *situs* during the administration of the estate is the former domicile of the decedent, and they are taxable there. The *situs* of personal property, for taxation purposes, does not change upon the death of the owner.

In Bank.

James M. Taylor, (*Cape & Boyd*, of counsel,) for appellants.

Walter H. Levy, for respondent.

McKINSTRY, J. This is an appeal from a judgment in favor of plaintiff for city and county taxes, and the case is brought here for review upon the judgment roll alone. The facts of the case, as shown by the findings, are substantially as follows: Jacob Rosenberg and the defendants are the executors of the will of Michael Reese, deceased, who died in Europe in 1878, being at the time of his death a resident of the county of San Mateo, in this state, where, on the fifth of September of the same year, his will was admitted to probate by the probate court of that county. Letters testamentary upon the will were issued out of that court to the executors. They qualified and entered upon the discharge of their duties, and have ever since then conducted the settlement and administration of the estate of the deceased in the court having jurisdiction of the settlement of the estates of deceased persons in the county of San Mateo, and the estate is still in process of settlement therein. One of the executors, Jacob Rosenberg, is, and has been ever since his appointment and qualification, a resident of the city of Chicago, in the state of Illinois; another of the executors, the defendant Charles Lux, is, and has been ever since his appointment and qualification, a resident of the county of San Mateo; and the other of the executors, the defendant Joseph Rosenberg, is, and has been ever since his appointment and qualification, a resident of the city and county of San Francisco, in this state. On the first Monday in March, 1882, the executors had on general deposit, in different banks situated and doing business in the city and county of San Francisco, the sum of \$565,504, of money of the estate, which was assessed for the fiscal year ending June 30, 1883, for city and county taxes, in the city and county of San Francisco, to "Lux, Charles, and J. Rosenberg, executors of M. Reese," and the city and county taxes mentioned in the complaint levied thereon. The same property was assessed to the executors for state and county taxes levied thereon

in the county of San Mateo for the same fiscal year, which taxes were paid by the executors in pursuance of an order of the superior court of the county of San Mateo, (where the estate is in process of administration,) directing the executors to pay the same.

The question is whether the property was assessable in San Mateo or in San Francisco. It is a settled rule that a general deposit is, in effect, a loan, the relation of the bank and depositor being that of debtor and creditor. Where, then, should the credits—the amounts due from the banks to the estate—have been assessed? The constitution (article 13, § 10) provides that all property, except certain railroad property, shall be assessed in the county where it is situated; and section 3629 of the Political Code requires of the assessor to exact “from each person” a statement in writing showing all property belonging to, claimed by, or in possession of such person, and “the county in which such property is situated, or in which it is liable to taxation,” etc. Neither the constitution nor the section of the Political Code referred to defines the *situs* of any property, and that is to be determined by the application of recognized principles of law. In the absence of statutory provisions on the subject, the *situs* of all personal property would follow the person of the owner. For most judicial purposes a *debt* or credit has no *situs* or locality. Burrill, Law Dict. *verb.* “*Situs*,” 2 Kent. Comm. 458, note. But when credits are made the subject of taxation, it is appropriate that their locality should be referred to the residence of the owner.

In *People v. Home Ins. Co.* 29 Cal. 533, it was held that personal property in this state belonging to a non-resident of the state may be assessed to the owner. As the statute required all property within the state to be taxed, it was held that, as to certain bonds within the state, the provisions of the law could be given effect only by distinguishing between the actual position of the property and its ordinary legal *situs*. Mr. Justice SAWYER said: “We think the bonds, or at least that which is symbolized or represented by them, are ‘property within this state’ within the meaning of the act. And this view is *not in conflict* with that adopted in *People v. Park*, 23 Cal. 138, and *People v. Eastman*, 25 Cal. 601. In those cases the owner resided in the state, and there was no occasion to consider whether the actual was different from the fictitious legal *situs* of the ‘money loaned’ or ‘solvent debt;’ and, the owner being a resident of the state, the proper place to tax this species of property, under the statute, was his place of residence.”

In *People v. Holladay*, 25 Cal. 306, it was held that, by reason of provisions of the revenue law in force when that case was decided, it was the duty of an assessor to assess *cattle* which were in his county between the first Mondays of March and August. *People v. Holladay* was decided at the April term, 1864. That the case did not decide that intangible property, as credits, should be assessed in **any** other county than that of the residence of the creditor, is appar-

ent from the fact that at the July term of the same year it was adjudged, in *People v. Eastman*, *supra*, that an assessment of a debt secured by mortgage should be made where the creditor resides, and not in the county where the mortgaged premises are situated; and that the debt, *when the creditor resides in the state*, has no *situs* for the purpose of taxation apart from the residence of the owner.

In *People v. Niles*, 35 Cal. 286, it was held that under the revenue law of 1861 a *situs* was assigned to tangible personal property—a schooner—in the county where it remained permanently, although it was not the county of the owner's residence. This case and others are commented upon in *People v. Whartenby*, 38 Cal. 466, where it was said: "A debt as such has no *situs*, but follows the person of the creditor. Indeed, it may be stated as a general rule that all personal property, of whatsoever character, (which, in the nature of things, is transitory,) is in law presumed to follow the person of the owner."

In some exceptional cases, however, and for some especial purposes, the rule has been varied by statute. In this state, for example, visible tangible property is to be taxed in the county in which it is found at the time of assessment. St. 1861, p. 423. But there is no provision to the effect that 'money at interest' or debts due to the person assessed shall be assessed in the county in which the debtor resides; and hence those come under the general rule that personal property follows the person of the owner."

And in *People v. Park*, 23 Cal. 138, the supreme court said: "We think the proper construction of the revenue law of 1860 is that all personal property of a tangible character was properly taxable in the county where it was actually situated at the time of the commencement of the assessment; but choses in an action and property of an intangible character, such as debts and the like, cannot be said to be 'within the district' of the assessor, and are therefore taxable in the county where the owner resides at the time. They could not properly be assessed where the debtors reside, as they may be non-residents or reside in several counties; nor where the property on which it may be secured is located, for that might be in several counties, and it is the debt, not the security, which is properly taxable. 16 Cal. 171."

So far as they may affect the question we have considered there is no substantial difference between the provisions of the Political Code and those of the several revenue acts which existed prior to its adoption. If the testator were living, and the moneys had been deposited by him, the amount of the debts due by the banks to him would be taxable in San Mateo, the county of his residence. The *situs* of the property, for taxation purposes, does not change upon the death of the owner. The personal property of decedents is taxed at the former domicile of the decedent. "During the settlement of the estate it must have a *situs* somewhere, and none so appropriate as where the decedent lived." Burroughs, Tax'n, 224. This is true of the property which would be taxable at the residence of the decedent did he

still survive; that is, of credits which have a *situs* attributed to them when they are made taxable.

Judgment reversed and cause remanded.

We concur: MORRISON, C. J.; MYRICK, J.; SHARPSTEIN, J.; MCKEE, J.; ROSS, J.; THORNTON, J.

65 Cal. 3

DE CELIS and others v. PORTER and others.

Filed January 29, 1884.

If A. objects to receiving the money of B., still, if he receives it, and more especially if he uses it for his own purposes, his objection to receiving it would count as nothing in defense to B.'s action to recover it.

Where one mortgage is given as a credit on another larger one, the larger may be foreclosed without any merger of the smaller one therein. The existence of one is consistent with the payment and satisfaction of the other.

Department 2.

Glassel, Smith & Patton, for plaintiff and appellant.

Graves & Chapman, F. H. Howard, and *R. M. Widney*, for respondent.

THORNTON, J. In the view we take of this case, we lay out of it the stipulations of March 14, 1876, and of June, 1876, except so far as is hereinafter pointed out. They were disregarded by the district court in pronouncing the judgment of July, 1877, which judgment was modified by this court so far as to allow the credit on the note and mortgage for \$37,500 of the \$5,255.30, being the amount of costs and interest thereon in the partition case of *San Fernando Farm Homestead Ass'n v. De Celis et al.* This allowance was for the benefit of Porter and Maclay, and was in effect an advance by the De Celis plaintiffs to Porter and Maclay. It was not intended as a gift by the De Celis plaintiffs to Porter and Maclay. They had not, previous to this action, paid any part of the sum allowed to the De Celises. The judgment as entered by the district court, under the order of the supreme court, made on the seventh day of June, 1879, allowing the sum of \$5,255.30, was not set aside or this credit stricken out. Admitting that Porter and Maclay did not consent to it, they did not move to set aside. This judgment was executed, their indebtedness in the foreclosure suit was paid, and they got the full benefit of this credit. Under all these circumstances it is clear that they

received so much money, which, *ex æquo et bono*, they were bound to refund to the De Celis plaintiffs, and that the law would imply a promise to pay this sum. It makes no difference that they did not consent to the judgment as entered in the supreme court, and by its direction in the district court. They got the benefit of the money. The amount was credited on the note and mortgage, the judgment of foreclosure was so entered, and as thus entered was executed. It is equivalent to receiving so much money which they used for their own purposes. Let it be conceded that they objected to receiving the money on the credit allowed, (a most unusual objection,) still they avail themselves of it, and cannot now be heard to object to paying it back. If A. objects to receiving the money of B., still, if he receives it, and more especially if he uses it for his own purposes, his objection to receiving it would count as nothing in defense to B.'s action to recover it. By using the money he gives all the consent required. By such conduct his objection is waived and displaced, and consent and approval take its place. It is equivalent to consenting originally, when the judgment was entered by the supreme court.

Although it does not clearly appear, by the judgment finally entered by this court, why the credit was allowed, still it is found that in this court a form of decree was prepared by order of the court, (called in the findings the Bishop judgment,) in which blanks were left for the amounts to be inserted. After the preparation of the form of decree by Mr. Bishop, Porter and George H. Smith, Esq., attorney for the plaintiffs, (the De Celises,) met to determine the amounts, and the result of their conference was that Porter agreed orally that if the judgment for costs in the partition case was allowed as a credit in the Bishop judgment, that he would carry out the contract made June 14, 1876, and thereupon Smith agreed to allow this credit, and it was accordingly allowed and inserted in the judgment. This revived the stipulation of June 14, 1876, and the contract made then, including the mortgage sued on in this action, as far as regards Porter, and he became bound by all the obligations of such contract which he had by it assumed. In fact, the main object of such stipulation and contract, as between Porter and the other contracting party, to whose rights the plaintiffs De Celis has succeeded, was to secure the credit of the partition costs in the mortgage then in suit, and to obtain security for the repayment of those costs, and anything allowed beyond the amount of costs. Afterwards, when Maclay objected (on what ground does not appear) to the Bishop judgment, and the same was modified, but still allowed the credit above mentioned, though Porter objected to it, (for what reason we are not informed,) still, as he received the consideration of the agreement made between him and the plaintiffs at the conference in regard to the Bishop judgment, we do not think that we should be justified in holding that he was thereby let out of his agreement reviving the

contract made between him and Smith, representing the De Celis plaintiffs. As far as we can get any light from the findings as to the objections of Porter and Maclay to the judgments above mentioned, they seem to have had relation to the state of the accounts between themselves, in which the De Celis plaintiffs had no interest. As said above, it appears from the findings that the judgment as finally entered by the order of this court was fully executed, and Porter and Maclay received all the benefit of the credit.

It appears from the above that the mortgage sued on was sustained by a sufficient consideration in its inception, was also sustained by the agreement made at the conference on the Bishop judgment that such consideration has never failed, but that the full benefit of this agreement has been received by Porter, the mortgagor, by the credit in the decree and the sale under it, by which the indebtedness secured was paid off in full. The court held that Maclay's indebtedness, which was secured by Porter's mortgage, was barred by the statute of limitations, as it arose from a parol promise. We do not think that it is barred. The action to recover it did not accrue earlier than the seventh day of June, 1879, when the final judgment was entered in the supreme court, and this action was commenced on the fourteenth day of July, 1880, on which day the complaint was filed.

It is contended that the mortgage sued on was extinguished by the foreclosure of the mortgage for \$37,500. We cannot perceive how this can be. The mortgage in this action originated from a credit on the foreclosed mortgage. How it can then be extinguished or merged does not appear. The ground of the existence of the mortgage herein is the credit allowed on the one foreclosed. The existence of one is consistent with the payment and satisfaction of the other. How, then, can there be extinguishment or merger of any kind?

With regard to the question of parties arising on the demurrer to the complaint, we think it only necessary to say that, in our view, the De Celis plaintiffs are the proper plaintiffs in this action, by reason of the assignment of Eulogio to them of the indebtedness herein, which carried the mortgage and the distribution of the indebtedness to those plaintiffs by the probate court. On the return of this cause to the court below, the complaint may be amended by striking out all the parties plaintiff except De Celis plaintiffs, and the court will then proceed to enter judgment for the De Celis plaintiffs, foreclosing the mortgage sued on herein; and if, on the sale of the property mortgaged, any deficiency arises, that such deficiency be docketed, three-fourths of it against Porter and the remaining one-fourth against Maclay. The amount of the indebtedness for which the mortgage herein is security is \$5,255.30, with legal interest from the seventh day of June, 1879.

The judgment is reversed, as well as the order denying the motion for a new trial, and the cause remanded with direction to the court

below to enter judgment in favor of the De Celis plaintiffs against Porter and Maclay as above indicated, the elements of which judgment distinctly appear in the findings. If it becomes necessary to protect the interest of the other persons improperly joined as plaintiffs herein, the court can, on their motion, require the money to be paid into court, and make such order distributing it as shall appear to be proper in view of the rights of all the parties.

Ordered as above.

We concur: SHARPSTEIN, J.; MYRICK, J.

64 Cal. 489

PAIGE v. CARTER.

Filed January 29, 1884.

Where the date of the delivery of a note is not material, the exclusion of evidence in regard to it is immaterial.

A witness may refresh his memory with a memorandum made by himself or under his direction at any time when the fact was fresh in his memory.

A defendant cannot recover under his counter-claim for any services rendered after the commencement of the plaintiff's action.

Department 2.

Schell & Treat, for plaintiff and appellant.

W. C. Turner and *S. L. Carter*, for defendant and respondent.

SHARPSTEIN, J. If it would make any material difference whether the note sued on was delivered at the date it bears on its face, or at some subsequent time, evidence tending to prove that it was delivered at the latter date should have been admitted. But, in view of the plaintiff's own testimony, we think the date of delivery of the note immaterial. One of the defenses set up by the defendant is that after making the note sued on he compromised with all his creditors, including the plaintiff, by agreeing to pay them 25 per cent. of their respective claims, and that they all accepted that sum in full satisfaction of said claims. The date of that agreement is posterior to the date which the note bears on its face; but the plaintiff claims that the note was not delivered until after said agreement was made, and therefore was not affected by it. By the agreement, all the creditors of the defendant, including the plaintiff, promised to accept said 25 per cent. of the amount of their claims in full payment and satisfaction of all claims, demands, or other indebtedness, of whatever kind or nature, then due them from defendant; and plaintiff testified

on the trial that "all the indebtedness of the defendant had matured prior to the date of the agreement of compromise. All his indebtedness to me, of whatever kind, whether this note in suit or others, or whatever it was, all had matured prior to the date of the compromise referred to." If the defendant fulfilled the agreement on his part, the indebtedness for which the note was given was paid, satisfied, and discharged before the commencement of this action. That indebtedness had matured before the date of the compromise agreement, and was clearly included in it. If the defendant did not fulfill on his part, the indebtedness for which the note was given was not satisfied and discharged. The date of the delivery of the note being immaterial, the exclusion of evidence in regard to it, and the denial of the plaintiff's motion to amend his complaint, by alleging a delivery after the composition agreement was entered into, could not prejudice him.

The objection to the defendant's referring to a memorandum to refresh his memory while testifying was properly overruled. Although not made at the time the occurrences took place, nor by witness himself, if made under his direction at any time when the fact was fresh in his memory, it was proper to allow him to refresh his memory by it. Code Civil Proc. 2047. But in support of his counter-claim he should not have been permitted to testify to work done for the plaintiff after the commencement of the action; and the testimony in regard to the relations which had existed between plaintiff and defendant was irrelevant, and the objections to its introduction should have been sustained.

In regard to the plaintiff's alleged cause of action, the court, in effect, charged the jury (1) that the note sued on was included in the composition between the defendant and his creditors, of whom the plaintiff was one; (2) that the plaintiff agreed to advance the sums to be paid under that agreement to creditors other than himself, and to advance to defendant the amount necessary to pay the expenses of harvesting and marketing defendant's wheat crop of that year,—the same to be shipped to and sold by plaintiff in order that he might reimburse himself for said advances; (3) that plaintiff made said advances, and defendant shipped said wheat to plaintiff, who sold the same for \$1,383.77 more than the aggregate of the sums advanced by the plaintiff; and if said excess was equal in amount to the sum due plaintiff under said composition, it was a full satisfaction of the note sued on.

These facts are doubtless established by the evidence beyond controversy; and if the fact of the plaintiff's having realized from the sale of the wheat a sum sufficient to reimburse him for his advances, and to pay him 25 per cent. of the amount due on said note at the date of said composition, satisfied and extinguished the indebtedness for which said note was given, there is nothing in the charge, as we view it, of which the plaintiff can justly complain. Although by the

terms of the composition the payment of 25 per cent. of the claims of creditors was to be made on or before the tenth of February, 1876, it is admitted that the plaintiff agreed to advance the money to pay them at the stipulated time, and to wait for reimbursement until the defendant's crop was harvested and sold. It seems to us that the plaintiff cannot now be heard to object that the sum due him under the composition was not paid according to its terms.

It was error to charge the jury that the defendant could recover under his counter-claim for services and material furnished by him to the plaintiff during the year 1879. The action was commenced on the twenty-third of October, 1879, and the defendant could only recover so much of his counter-claim as existed at that time. Code Civil Proc. 438.

Judgment and order reversed.

We concur: THORNTON, J.; MYRICK, J.

64 Cal. 487

HOWARD v. STRATTON.

Filed January 29, 1884.

Where a promissory note is given to secure a promise by the maker that he will support the payee and care for him, and such promise is fulfilled, the note is discharged, and parol evidence is admissible to prove that a written agreement is totally discharged.

Department 2.

Arnold & Jones, for plaintiff and respondent.

Leach & Parker, for defendant and appellant.

By THE COURT. The court erred in excluding evidence tending to prove that there was an agreement between Tyson and Stratton by which the former agreed to let the latter have the rancho on which he lived in consideration of his giving Tyson a home and support during the residue of his life, and that the notes sued on in this action were given by Stratton to Tyson to secure the performance by Stratton of said agreement on his part, and that he had performed the same. The admission of such evidence would not violate the rule which forbids the introduction of parol evidence to contradict or vary a written contract. If the notes were given to secure the execution by Stratton of a promise to support and take care of Tyson, and that promise was fulfilled, the notes were discharged, and parol evidence is admissible to prove that a written agreement has been totally discharged. There is nothing in this which tends to contradict or vary a written contract.

It does not appear that an exception was taken to the ruling of the court on the defendant's motion to strike out the testimony of John Treat, and we cannot, in the absence of an exception, review said ruling.

Judgment and order reversed.

HOWARD v. STRATTON.

Filed January 29, 1884.

Howard v. Stratton, ante, 263, followed, and judgment reversed.

Department 2.

Arnold & Jones, for respondent.*Leach & Parker*, for appellants.

BY THE COURT. On authority of *Howard v. Stratton*, ante, 263, the judgment and order in this case are reversed.

64 Cal. 504

CITY AND COUNTY OF SAN FRANCISCO v. FLOOD.

Filed January 29, 1884.

Personal property assessed as "mining stock," with the value given, is sufficiently described to make the assessment valid.

All private property in this state is taxable, and the legislature has no power to exempt any of it. 34 Cal. 433.

Where, in a suit for taxes, the complaint enumerates personal property just as it is assessed, the enumeration is sufficient.

Shares in a corporation are only exempt from taxation where the entire capital or property of the corporation in which the shares are owned, is assessed.

Shares in mining corporations, constituted under the laws of this state, but whose tangible property is situated in another state, are taxable here.

SHARPSTEIN and MCKINSTRY, JJ., dissent.

In Bank.

Lloyd, Newlands & Wood, for appellant and defendant.*John P. Bell*, for plaintiff and respondent.

THORNTON, J. This action was brought to recover of the defendant, as the surviving partner of Flood & O'Brien, certain state and city and county taxes on personal property, claimed to be delinquent and unpaid for the fiscal year 1876-77. There was judgment for plaintiff and motion for new trial by defendant, which motion was denied, and the appeal is prosecuted by defendant from the judgment and the order denying the motion just mentioned. The assessment was for "mining stock," and its value is inserted in the assessment roll or assessment book (such is the term used in the

statute, Pol. Code, § 3650) as being \$600,000. It is argued that the term "mining stock" does not furnish such a description of the property claimed to be assessed as satisfies the requirements of the revenue law. The statute in relation to the mode of entering personal property on the assessment roll or assessment book is as follows: "All personal property, showing the number, kind, amount, and quality; but a failure to enumerate in detail such personal property does not invalidate the assessment." Pol. Code, § 3650, sub.

As we interpret this section, the latter clause allows a description as general as "mining stock." The words used in the statute were intended to authorize the assessor to do just what was done here.

The assessment here is sustained by the rules laid down in *People v. Holladay*, 25 Cal. 300; *People v. McCreery*, 34 Cal. 434; *Falkner v. Hunt*, 16 Cal. 173; and *People v. Sneath*, 28 Cal. 612. In *People v. Holladay* it was held that an assessment of personal property, stating its kind, was sufficient. In *People v. McCreery*, "money loaned" is held to be sufficient. In *Falkner v. Hunt*, it was said that an assessment stating the different kinds of personal property would be a compliance with the statute. In *People v. Sneath*, "personal property" held a sufficient description. The rulings in the cases just cited were made under statutes not more liberal in their provisions than the statute under which the assessment in this case was made. If the descriptions in the assessments in the cases cited are sufficient, we see no reason why the assessment under consideration is not. The rule as to the degree of certainty required in describing personalty, in assessments, for taxation, is this: that the property shall be so described that tax-payers may know for what they are to be taxed. *People v. Home Ins. Co.* 29 Cal. 549; *Goddard v. Town of Seymour*, 30 Conn. 394; *Hamersley v. Franey*, 39 Conn. 176; *Monroe v. Town of New Canaan*, 43 Conn. 312. In the case last cited the property was described, "20 bank stock, \$2,000." Held sufficient as a description of 20 shares of bank stock under a statute requiring that "shares owned by any person resident in this state, of the capital stock of any bank," etc., be set in the list of such owner. If the description of the property assessed in the assessment is certain enough to inform the tax-payer for what he is to be taxed, it is sufficiently certain. Mining stocks could scarcely be misunderstood by any man of ordinary intelligence in this state, or, indeed, in the commercial world, among all English-speaking people.

It may be observed here that the description in question was made either from a list furnished by defendant or some one on his behalf, and by his authority; or, no list having been so furnished, it was of necessity made by the assessor. If the description was taken from a list furnished by the defendant, or some one on his behalf and by his authority, he ought not to be heard to complain of the insufficiency of the description. If made by the assessor without the aid of such list,

the assessor has given a description as certain as could reasonably be required of him, and, under such circumstances, the defendant's objection to the assessment should not be regarded. We regard the assessment as complying with the statute and sufficient.

But it is said that shares in the capital stock of corporations were not taxable property under the constitution of 1849, and the revenue laws then in force. It is not denied that shares in the capital stock of corporations were what is usually styled property when the assessment in this case was made, and if it was denied we should, nevertheless, hold them property. The reasons for such holding are too manifest to require enumeration; and by the thirteenth section of the eleventh article of the constitution of 1849 it was declared that all property in this state should be taxed in proportion to its value, etc. It has been considered as the proper interpretation of the constitution referred to ever since the elaborate judgment in the case of the *People v. McCreery*, 34 Cal. 433, that all private property was taxable in this state, and that the legislature had no power to exempt any of it from taxation. This ruling was approved in *People v. Gerke*, 35 Cal. 678, and in *People v. Black Diamond C. M. Co.* 37 Cal. 56. The word "property" is used in no peculiar sense in the section of the constitution referred to, but in its popular and ordinary one. *People v. Eddy*, 43 Cal. 336. There is nothing in *People v. Hibernia Bank*, 51 Cal. 243, in conflict with what is here said. Shares in corporations can be easily valued. So much for the constitution.

As to the sections 3640 and 3641 of the Political Code, relied on to show that the shares above mentioned are not taxable, in our opinion section 3640 by its express terms, only exempts the shares from assessment where the entire capital or property of the corporation in which the shares are owned is assessed, and it does not appear that the corporation or corporations in which the shares here assessed were owned, were assessed at all during the fiscal year for which the assessment herein was made. And further, if mining stocks, under any circumstances, were taxable during the fiscal year above referred to, the assessment must be upheld. We have already held that shares in mining corporations constituted under the laws of California, but whose tangible property was situate in another state, were taxable, and that section 3640 does not and never did apply to such corporations. *City and County of S. F. v. Fry*, 11 Pac. C. L. J. 392. It may be added that the same is true of section 3641. To sustain the assessment, we must presume that the assessor, in making the assessment, acted in accordance with law, and therefore we are authorized to presume that the circumstances existed which authorized the assessment involved in this case, viz., that the entire capital stock or property of the corporation was not assessed, or that the property of the corporation was situate in another state. It is incumbent on the defendant to show that the action of the assessor is unauthorized by law. If the property of the corporations was in this state, and was assessed,

it was susceptible of ready proof. The law requires such matters to be recorded in assessment books, (Pol. Code §§ 3650-54,) which are accessible to all tax-payers, and if any assessments of the property of the corporations referred to had been made, that fact could have been established without difficulty by proof obtained from the assessment books.

It is said the description in the assessment roll must be sufficient for the purpose of equalization; that it is the duty of the board of equalization to sit in judgment upon the valuation of the property which they find in the roll; that it is necessary that the roll should furnish such a description as will enable the board to clearly and satisfactorily determine the question of valuation, and a description which fails to furnish the information necessary for such action on the part of the board is clearly insufficient. To sustain this position, *People v. Holladay*, 25 Cal. 300, is cited. The action of the board in dealing with the valuation of the property listed in the roll is based upon evidence which may be adduced before the board. See sections 3673-77, Pol. Code. As to increase of amount of valuation, or reduction, the board can only act on evidence. See sections above cited, and section 3681. We cannot see how it could act otherwise. We see no difficulty in the defendant's way that could not have been removed by means furnished him by the law, in supplying any information in regard to the value of the property assessed to the board of equalization. If the mining stock was overvalued, it certainly was in the power of the defendant to adduce evidence to make it so appear to the board of equalization, that it might discharge intelligently any duty imposed on it by law in regard to such overvaluation. What is said above in regard to description is alike applicable here. Whether the description was furnished by the tax-payer or was made by the assessor, the tax-payer having failed to furnish a list, the complaint of the tax-payer in regard to it should not be regarded. In our opinion, it is the duty of the tax-payer to furnish a true and correct list of his taxables to the assessor, and if he fails to do so, and any loss should result to him in consequence of such failure, his complaints on such score should meet with no favor in a court of justice. Further, in regard to the character of the description of the personal property, and what information it should give to the board of equalization to enable it to perform its functions under the law, it may be said that if the description meets the requirements of section 3650, sub. 4, of the Political Code, above cited, it must be sufficient for all purposes. We have already determined that the description here accords with what is prescribed in the section referred to, and this disposes of the question.

But it is said that the complaint is insufficient in that it does not enumerate the property as required by the statute. See St. 1877-78, p. 338. The property is enumerated as *mining stock*. It is enumerated as it is assessed, *in totidem verbis*. We cannot think

that the law-makers intended to require any other enumeration. The form of complaint is prescribed by the statute. See St. above cited, p. 339, § 2. The following are the words used in the form prescribed, in relation to the property assessed: "Which said taxes were duly assessed and levied upon personal property, to-wit: (enumerating the property) for the fiscal year, (naming it.)" The perusal of these words would scarcely suggest to a man of ordinary intelligence, knowing what is meant by the word "assessment," that the enumeration of the property required would be other and different from that which appears on the face of the assessment. When the statute provides that the personal property assessed should be enumerated, the intention is that it shall be enumerated as the assessing officer has enumerated it in the assessment. It would be a peculiar mode of reasoning to hold that a fuller and more definite enumeration is required of the pleader, when we see in the first section in the act in which the provision as to enumeration is made, language validating the assessment of taxes on all personal property for the fiscal year above mentioned, and declaring it "valid and binding, both in law and equity, against the persons and property assessed," and further declaring the levies of said taxes by the board of supervisors of the city and county of San Francisco "valid and binding, effectual and legal," and that "no error, informality, or irregularity, of whatsoever kind or nature, in the acts or proceedings of the assessor, board of equalization, auditor, or any other officer or officers of said city and county, in assessing, equalizing, levying, or preparing original or duplicate assessment rolls, shall vitiate the assessment or levy of taxes," etc.; "but the same" (referring to all the acts of the officers previously mentioned) "are, for all purposes affecting the assessment, equalization, and levy of taxes, validated, ratified, legalized, confirmed, and adopted."

With such provisions as these in the statute, it would be difficult to reach the conclusion that the statement of the property assessed in words identical with those used by the assessing officer, and set down in his assessment book, would not satisfy the enumeration required by the statute. If a fuller and more definite statement of the property assessed were required, the intention of the legislature would be in ninety cases in a hundred defeated. The intention of the legislature in enacting this statute of 1878 was to enforce the collection of taxes by action. The averments of the complaint prescribed were susceptible of proof by the public records,—the assessment books or rolls,—and accordingly it was provided in the first section of the act that the duplicate assessment rolls for the years mentioned therein should be *prima facie* evidence of such assessment. If the pleader is to insert in his complaint a full and definite description of the property assessed, he must also aver that the property thus described is the same as the property mentioned in the assessment. If this is required, he must also prove such averments.

He must prove that the particular property alleged to have been assessed was assessed, and its identity with that in the assessment. How could it reasonably be expected that such a thing could be done? What memory could retain the matters to be proved? It would impose upon the memory of the assessing officers and their assistants a tax to which the memory of a Macaulay or a Mezzofanti would be unequal. It would follow that the actions could not be successfully prosecuted except in rare instances, and the attempt to enforce the collection of delinquent taxes by suit would fail. Consequently, we say that if any such construction as that contended for in regard to the statement of the property assessed in the complaint is sustained, the legislature would defeat its object by making a requisition which would render the prosecution of such suits, for the greater part, of no avail.

To sustain the contention just above discussed, appellant's counsel cite and rely on *People v. Holladay*, 25 Cal. 301. The action in this case was to recover delinquent taxes on personal property and the statute under which it was instituted—see act of May 17, 1861, (St. 1861, p. 471,)—provided that the district attorney (the officer designated to bring the action) should state in the complaint, *inter alia*, "the kind and quantity of the property assessed." This language was plain in its meaning. It left no ground for doubt, no place for construction. The pleader in the case cited merely stated the property assessed as "*personal property*," and the court held, and correctly held, that the complaint was substantially defective, and the judgment which had been rendered on it by the court below in favor of the plaintiff ought not to be allowed to stand, and it was reversed. But there is no such requisition in this case, and nothing similar to it. Reading together all the provisions of the act of 1878, we have no doubt that the pleader has enumerated the property assessed as was required by the statute, and that the complaint is not obnoxious to the criticisms of it preferred by the learned counsel for the appellant. We think that the validating provisions of the act of 1878, above referred to, strengthen the conclusions reached herein on all the points discussed; but without these provisions we think such conclusions are sound and well maintained.

It follows from the foregoing that the rulings of the court below are without error, and the judgment and order appealed from are affirmed.

We concur: MYRICK, J.; MCKEE, C. J.; MORRISON, J.; ROSS, J.

We dissent: SHARPSTEIN, J.; MCKINSTRY, J.

64 Cal. 493

MOUND CITY LAND & WATER ASS'N and another v. PHILLIP and others.

Filed January 29, 1884.

A decree of partition does not give a new title to the parties among whom the possession is distributed in severalty.

Where several parties hold possession in common of a tract of land by the license of the government, with the right in the government to segregate to them a smaller tract within the limits of the larger one, to be ascertained by future survey, a decree of partition made before the survey operates only upon the existing *status*, and gives to each tenant the right to enjoy in severalty the temporary possession they enjoyed in common; it does not and cannot anticipate the survey, and divide the land subsequently ascertained by it.

In Bank.

R. M. Widney, for respondents.

Thom & Stephens and *T. H. Howard*, for appellants.

McKINSTRY, J. *Vejar*, *Palomares*, and *Arenas* obtained a grant of the San Jose rancho and the addition thereto. *Dalton* acquired the interest of *Arenas*. In 1846 certain proceedings were had before the judge of first instance, which (as claimed by appellant) resulted in a judgment of partition of the lands granted between *Vejar*, *Palomares*, and *Dalton*. In 1853 *Vejar* and *Dalton* presented their petitions to the board of land commissioners for confirmation of the tracts claimed to have been set aside to them respectively by the judgment of partition, and *Palomares* presented his petition for the confirmation of his claim to an undivided one-third part of the San Jose and addition. The decree of the district court (on appeal from the commissioners) confirmed to each of the persons named an undivided one-third part of the San Jose and addition. The appeal to the supreme court of the United States having been dismissed, and final survey of the lands made, each of the confirmees obtained a patent from the United States for an undivided one-third part of the lands, the claims to which were confirmed by the decree. One of the patents was issued in December, 1875; the other, January 26, 1875. This action for a partition of the lands described in the patents was commenced January 19, 1880. It would seem that, in the proceeding before him, the judge of first instance undertook to perform the task reserved in the political department of the government, to-wit, the task of fixing definitely and finally the boundaries of land granted. He then divided the lands within such boundaries. His attempt to fix for the government the boundaries of the lands granted gave no additional force to his alleged judgment or partition. If juridical possession had previously been given, and its effect was

to confine all the rights of the parties within the limits of such juridical possession, the judge could not, *pendente lite*, or by his judgment, extend their rights beyond such limits. They were not owners, as tenants in common or otherwise, of any lands finally ascertained to be part of the public domain. If juridical possession had not been given, the right of the grantees or their assigns to the temporary possession of all the lands, as the same appeared from the *deseno* and grant, could not be extended beyond the exterior limits thus appearing.

Even if the survey, made under the supervision of the judge of first instance in the partition proceedings, can be treated merely as an ascertainment of the exterior boundaries as the same were laid down on the *deseno*, and described in the grant and petition therefor, the partition of the lands temporarily possessed by the grantees or their assigns—that is to say, of the lands which they had the right to possess in common until the lands granted should be measured by the government—was operative only until such measurement. A decree of partition does not give a new title to the parties among whom the possession is distributed in severalty. *Wade v. Deray*, 50 Cal. 376. Neither the judge of first instance nor the parties in interest could then know where, within the exterior limits, the government would select the specific tract in and to which their complete title would ultimately vest. Until such selection the grantees, and their successors in interest, retained, as against trespassers, a right to the possession of the whole. *Ferris v. Coover*, 10 Cal. 589. But this possession they held subject to the power of the government to segregate a specific tract, and thus to deprive them of all right beyond the limits of such tract. Like every other judgment, the judgment or partition (if there was one) was binding and conclusive only with respect to its subject-matter. It was the right to the temporary possession, previously held in common, which was affected by the judgment. The lands beyond the boundaries which the United States, as successor of Mexico, established, continued to be government property until the boundaries were so established. In the mean time the grantees occupied to the exterior limits by license of the government; a license which was revoked, as to lands without the final survey, when the final survey was approved. The right of possession was not an equitable right which ripened into a legal title to the *same lands* upon final measurement. It was contingent and *limited in time* as to the lands which should be excluded by the final measurement. The judgment in partition did not and could not anticipate the action of the political power, and divide in advance the lands which should subsequently be surveyed. It operated upon the existing *status*, and gave to each of the parties the right to enjoy in severalty the same temporary possession of all the lands within the exterior limits which they had previously enjoyed in common. Until final survey by the

United States of the San Jose and its addition, there was no specific tract to which attached a complete proprietorship in favor of the grantees, and those deriving from them. Whatever the nature of the grant or grants, the petitioners to the board of land commissioners submitted themselves to the jurisdiction of the tribunals created by the act of 1851 for the ascertainment of the rights protected by the treaty, and the patent they obtained is a solemn record of an adjudication, binding upon them, that the lands granted were never finally segregated from the body of the public lands by the Mexican government.

It would seem to be sufficiently manifest that the judgment of partition of lands, without the limits of the final survey afterwards made, had effect, even as to the parties to it, only while their occupation lasted with the consent of the government. As the decree did not provide for the separate disposition of the specific portion of the lands, with respect to which the rights of the grantees ultimately became perfect, the decree, as a whole, ceased to operate when the boundaries of such specific portion were determined. Suppose a decree of partition between tenants in common for a term of years, and, at the expiration of the term, that the lessees should acquire from the lessor the fee to a specific portion of the land demised, would it be said that the decree of partition would estop one of the grantees from claiming an undivided interest in the lands conveyed? Or, take a case more proximately analogous to the one at bar. Two persons asserting an equity in lands agree to a decree of partition. Afterwards they secure, from the holder of the legal title, a conveyance of his title to a portion only of the lands, which lies entirely within the limits set apart to one of them by the partition. Does the other get nothing by the conveyance.

Three "grantees" of the former government have, by its permission, the common possession of a tract, with full knowledge the government may take from them such possession, except in a smaller tract, and confer upon them the full proprietorship of such smaller tract. A decree is entered parting the possession, so that each shall possess, exclusively, a specific portion of the larger tract. In the case before us, between 600 and 700 acres of the land patented was not partitioned by the judge of first instance, while about 10,000 acres, not embraced within the tract patented, were set apart to the parties by the decree of partition. Not only was the *right*, or estate, which was changed by the judgment from a common to a separate right, different from that asserted by the parties to the present action, but the tract of land which is the subject of the present action is a different tract from that the common possession of which was made a separate possession by the judgment. The alleged separate occupation of the respective parties, whether referred to the judgment of partition, or to a supposed oral agreement for partition, must, in the

absence of evidence to the contrary, be held to have had relation to the temporary possession and right of possession of which we have spoken.

It is well settled, as argued by counsel for appellant, that confirmation and patent, under the act of 1851, only settle the legal title, and that such title inures to the benefit of the parties beneficially interested. But the acceptance of this proposition only brings a return of the question, had appellant acquired a title, legal or equitable, to a specific portion of the land described in the complaint, which he could assert against the co-patentee of his grantor? This inquiry we have tried to answer. The precise question we have been considering has never been determined, but intimations have been made by our predecessors which indicate that they were in accord with the views we have expressed. See *Hathaway v. De Soto*, 21 Cal. 191; *Mahoney v. Van Winkle*, Id. 580; *Carpenter v. Thirston*, 24 Cal. 268.

Some of the findings are somewhat informal, but the court passed upon the material issues.

Judgment and order affirmed.

We concur: THORNTON, J.; MCKEE, J.; SHARPSTEIN, J.

MYRICK, J.: I dissent.

2 Cal. Unrep. 255

DUANE *v.* NEUMANN.

Filed January 29, 1884.

The final court must find upon all the material issues raised by the pleadings, and when this rule is not observed the judgment will be reversed.

THORNTON and SHARPSTEIN, JJ., dissenting.

In Bank.

G. W. Tyler, for appellant.

H. Eickhoff, for respondent.

BY THE COURT. It has been repeatedly ruled here that the trial court must find upon all of the material issues raised by the pleadings. That rule was not observed in the present case, for which reason the judgment and order are reversed, and the cause remanded for a new trial.

THORNTON and SHARPSTEIN, JJ., dissent.

2 Cal. Unrep. 259

SUPREME COURT OF CALIFORNIA.

McNAMARA v. HAMMERSLAG.

Filed January 29, 1884.

In a suit on an undertaking given to *prevent* a levy, where the complaint states that it was given to *release* a levy, the variation is not material.

McKEE, J., dissents.

In Bank.

W. J. & Wm. Groves, for appellant.

M. C. Hasset, for respondent.

MYRICK, J. Suit on an undertaking given under section 540, Code Civil Proc. The complaint avers the issuance of the attachment, and that under it the sheriff attached "certain property," (not stating what kind or of what value,) and that the defendants being desirous of having the property attached released therefrom, executed the undertaking. A copy of the undertaking is attached to the complaint. The undertaking, after reciting the issuance of the writ and the command thereof, states, "now, therefore, we," etc., "in consideration of the premises, and to prevent the levy of said attachment, do hereby," etc.

The point presented by the appellants is that, as the undertaking recites that it was given to *prevent* a levy, the allegation of the complaint being that it was given to *release* a levy, the judgment cannot be sustained. The question here involved was substantially considered in the first paragraph of the first opinion in *Preston v. Hood*, 1 PAC. REP. 487, though in that case there was an allegation in the complaint that the undertaking was given to prevent the levy, and that upon the delivery of the undertaking the property was released. We think the point is not well taken.

Judgment affirmed.

We concur: SHARPSTEIN, J.; MORRISON, C. J.

We concur in the judgment: THORNTON, J.; MCKINSTRY, J.

McKEE, J., *dissenting*. I dissent. The allegations of the complaint are that, in an action, a writ of attachment was issued, which was levied on certain property belonging to the defendant in the action; that for the purpose of having the property attached released from

the attachment, "the defendants herein executed and delivered to the plaintiff a written undertaking, a copy of which is hereto attached, marked Exhibit A, and made a part of this complaint;" and that upon the execution and delivery of the bond, the attachment was discharged and the property was released, yet the defendants have refused, on demand, to pay the amount of the judgment rendered in the attachment suit against their principal in the bond, and hence the suit upon the bond. Reference in a pleading to an exhibit as part of a pleading is not pleading; it is merely evidential. *Mayor and Common Council of Los Angeles, etc., v. Signoret*, 50 Cal. 298. The cause of action as stated in the complaint is therefore upon a bond given for the release of property which had been attached.

The answer specifically denies the allegations of the complaint. There was no finding of facts, but judgment was given for the plaintiff. Impliedly, the court found all the facts as alleged in the complaint. But the bond referred to in the complaint was not a bond for the release of property which had been taken in attachment; its recitals are substantially: Whereas, an attachment has been issued and placed in the hands of the sheriff for execution, whereby he is commanded to attach and safely keep all the property of the defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the demand of the plaintiff in the action, as stated in his complaint, unless a bond be given in amount sufficient to satisfy the demand, and the defendant is desirous of giving such an undertaking: "Now, therefore, we, the undersigned, * * * in consideration of the premises, and to prevent the levy of said attachment, do hereby jointly and severally undertake in the sum of thirteen hundred dollars, in gold coin, and promise to the effect that if the plaintiff shall recover judgment in said action, we will pay to the plaintiff upon demand the amount of said judgment, together with the costs, not exceeding in all the said sum of thirteen hundred dollars in gold coin of the United States." The bond was therefore "to prevent the levy of an attachment." A bond given to prevent the levy of an attachment does not prove a cause of action upon a bond given for the release of property already attached. Between such bonds there is no identity; the promises to pay may be the same, but they depend upon different considerations. One could not be used to prove a cause of action upon the other. Between such a cause of action and the proof, there would be such a variance as would prevent the rendition of judgment in favor of the plaintiff. The allegations, proofs, and judgment in an action must correspond to sustain the judgment.

In *Percival v. McCoy*, 13 Fed. Rep. 379, the complaint alleged that a bond was executed and delivered by the sureties to the plaintiff as sole obligee; but the bond referred to in the complaint recited that it was given to five persons as obligees, one of whom was the plaintiff. "It seems clear," says the court in the case, "that if this bond

were offered in evidence under such an allegation there would be a fatal variance between the instrument as set out and the proof. Granting that the plaintiff might sue alone, * * * without joining the other obligees, he must, nevertheless, set out and state the bond correctly, with proper allegations, showing that he alone has received injury by the breach, and therefore that he brings the suit without joining the other obligees as plaintiffs. But he cannot set out a bond as running to or made to himself alone, and give in evidence an instrument to himself jointly with other obligees."

I think the judgment should be reversed. *Laveaga v. Wise*, 13 Nev. 296; *Coburn v. Pearson*, 57 Cal. 306.

64 Cal. 498

PEOPLE v. WILLIAMS.

Filed January 29, 1884.

The wharf in question, in Channel street, in the city of San Francisco, although not built by, belongs to, the state. It is within the jurisdiction of the board of harbor commissioners, and Channel street is subject to the control and regulation of the state.

The mere establishment of a harbor line does not deprive the state of the right to control the navigable waters within the line; nor does a grant of lots to the city divest the state of its sovereign rights over the navigable highways on which the lots are bounded.

A statute dedicating to the city a portion of the navigable waters of the harbor for the purpose of deepening and improving them, does not, *per se*, operate as a dedication or surrender. It contains an offer of dedication, which only becomes complete upon its acceptance by the city and the completion of the improvements. There being no acceptance the state can withdraw the offer in whole or in part.

In Bank.

G. C. Coogan, for appellant.

M. Mullany, for respondent.

McKEE, J. Channel street, between Fourth and Fifth streets, in the city and county of San Francisco, is 200 feet wide, covered by the waters of the bay of San Francisco, and navigable by vessels engaged in commerce. On the north side of this portion of the street the defendant, in the year 1873, constructed a wharf, which he afterwards, on September 12, 1876, sold and conveyed to the plaintiff, by the following description: "All that wharf structure in the city and county of San Francisco, situate on the north side of Channel street, between Fourth and Fifth streets, adjacent to and in front of block No. 17, as known on the official map of said city and county of San Francisco." Notwithstanding this transfer the defendant continued to dock his

vessels within the street and discharge their cargoes at the wharf, for which the board of harbor commissioners demanded of him dockage, wharfage, and tolls, from November 10, 1876, until June 10, 1877; but he refused to pay upon the ground that the wharf was not within the jurisdiction of the board, and that is the question.

There is no doubt of the right of the state to control and regulate the public use of the navigable waters within its boundaries, subject only to restraints upon the right arising out of the power of congress over commerce. But it is claimed for the defendant that the state has, by legislation, surrendered its right over the water highway in question to the city and county of San Francisco. The first legislation upon the subject is to be found in the statute passed March 26, 1851. By that statute the state granted to the city of San Francisco the tide-covered lands known as the beach and water lots, and established a permanent water front for the city. St. 1851, pp. 306, 307.

The mere establishment of a harbor line does not deprive the state of the right to control and regulate the navigable waters within the line. *Eldridge v. Cowell*, 4 Cal. 80; *Guy v. Hermance*, 5 Cal. 73. Nor did the grant of the beach and water lots, although it vested the property in them in the city, (*Holladay v. Frisbie*, 15 Cal. 630,) divest the state of its sovereign rights over the navigable highways on which the lots were bounded. Nor was it intended to have that effect, because section 6 of the statute declared: "Nothing in this act shall be construed as a surrender by the state of its right to regulate the construction of wharves or other improvements, so that they shall not interfere with the shipping and commercial interests of the bay and harbor of San Francisco." All of the streets of the city within the harbor line as established by that act, as they were laid down on the map, called the official map of the city, and all the streets mentioned and referred to in the act were afterwards confirmed, established, and dedicated to the public use as streets. Section 7, St. 1858, p. 324. Channel street was one of those streets. It was therefore a public street of the city, dedicated to public use to its full extent, and subject, in that portion of it covered by the navigable waters of the bay of San Francisco, to the control and regulation of the state.

In 1863, the state, in the exercise of its right, established the board of state harbor commissioners to take possession of and hold all the portion of the bay of San Francisco and its appurtenances, to the extent of 600 feet from the harbor line, and to collect tolls, dockage, rents, and wharfage thereof for the purposes of commerce. Sections 1, 2, 3, 4, St. 1863, p. 406, and St. 1863-64, p. 138. On March 20, 1868, the state also dedicated that portion of the middle of Channel street, lying east of and between the easterly line of Harrison street and the water front, to be an open channel, 60 feet wide from Harrison to Seventh street, and 140 feet wide from Seventh street to the water front; and authorized the city to extend streets across it by arched

bridges or draw-bridges, without the right of demanding, or collecting tolls, or wharfage thereon. Sections 1, 2, St. 1868, p. 355. Four days afterwards, viz., March 30, 1868, the state established a board of tide-land commissioners with authority to take possession of the salt marsh and tide-lands situate in the city and county of San Francisco, to "survey the same to a point not beyond 24 feet water at the lowest stage of the tide, to establish the water-line front of the city south of the terminus of Second street, as established by the act of 1851, and to lay off the space within this water-line into lots and blocks in accordance with the official map and survey of the city, reserving so much thereof for streets, docks, piers, ship channels, drains, or other use necessary for the public convenience and the purposes of commerce as in their judgment will be required; also 30 acres, exclusive of streets, basins, public squares, and docks lying southerly from Channel street, and outside of the line known as the red line water-front of Mission bay, subject to the rights of the city and county to establish and regulate streets, alleys, docks, wharves and basins, culverts and sewers, and the laying down of gas and water-pipes, and to such jurisdiction and control of the city and county over said street," etc.

The state, however, did not surrender its right to control and regulate the navigable waters within the space inside of the water-front, for it was by the act provided that "nothing in this act shall be construed to interfere with the collection of dockage and wharfage by the state, nor with the right of the state to construct adjoining the property granted such wharves and docks as may be from time to time provided." Sections 1, 4, 5, St. 1868, pp. 716, 718. But in March, 1872, the state vacated all the streets, alleys, and market places within the exterior boundaries of the marsh and tide-lands, as surveyed by the tide-land commissioners, and granted the lands covered by them to the city and county of San Francisco, with full power to regulate, manage, control, and donate, or dispose of the same by ordinance for railroad and other commercial purposes, (section 1, arts. 71, 72, p. 722;) and on April 1, 1872, that portion of Channel street, delineated as a canal on the official map of the city, lying east of the westerly line of Florida street, and between the west line of Florida street and the northeast line of Seventh street, and so much of the channel of Mission creek as lies south of the south line of Channel street, were declared and dedicated to be an open canal, for the purpose of drainage and navigation, across which the board of supervisors of the city and county were empowered to "extend the streets abutting upon Channel street and the said canal upon draw-bridges, which would not obstruct the navigation of the canal; to keep the canal dredged to such a depth that the water therein will be two feet deep at the lowest tide, and to construct a bulk-head upon and along both sides of the canal, and for that purpose to condemn private property lying on either side of Channel street or the canal." Sections 1, 2, 3, 4, St. 1871-72, p. 926.

Upon this last statute the defendant makes his contention that Channel street and its appurtenances were placed by the state under the jurisdiction of the city and county of San Francisco, and that the state retained no jurisdiction over it. Conceding that the state had the right to dedicate to the city a portion of the navigable waters of the harbor for the purpose of deepening, improving, and preserving the same, and for the regulation of vessels and wharves therein, and to surrender its right to control and regulate them, the statute relied on, *per se*, did not operate as a dedication or a surrender. It contained a mere offer to dedicate a portion of Channel street and a portion of Mission creek as an open canal, if the city would deepen and improve it as the legislature prescribed. But it was for the city to accept the offer and complete the improvements. If it did not the dedication was not complete. The passage of an ordinance setting apart and dedicating a portion of the water-front in a harbor for public use as a free public dock for ships, is, said the late supreme court, a mere offer to dedicate, and the dedication is not complete, nor does the public acquire any right to the easement until it has been accepted and used by the public in the manner intended. *City and County of San Francisco v. Calderwood*, 31 Cal. 586; *Same v. Canavan*, 42 Cal. 541.

The city did not accept the offer made by the statute of 1871-72; and the improvements were not made. Under these circumstances the state had the right to recall its offer in whole or in part, and to deal with the subject of it in the exercise of its sovereign powers. As part of the water highway of the state, the proposed canal and the streets connected with it were subject at any time to the exercise of those powers, (*Polack v. Trustees, etc.*, 48 Cal. 491;) and on March 27, 1874, the legislature of the state vacated a portion of Channel street, (section 3, St. 1873-74, p. 711;) and afterwards, on February 28, 1876, placed Channel street, as far west as Fifth street, under the jurisdiction of the board of state harbor commissioners. Section 2,524, Pol. Code. See, also, section 4, St. 1877-78, p. 263. As it is admitted that the wharf structure in controversy is located in Channel street, and that, although it has not been built by it belongs to the state, it results that the wharf is within the jurisdiction of the board of harbor commissioners, and that Channel street, in which it is located, is subject to the control and regulation of the state.

The cases of *People v. S. P. R. R.*, No. 5,607, and *People v. Hooper*, No. 5,608, are not in conflict with this conclusion. In those cases the wharves were the property of the respective defendants, built by them on their own soil, bounding on Channel street, of which they were in possession under titles from the state. The cases did not involve the jurisdiction of the board within the water highway of Channel street; and they are not analogous to the case in hand.

Judgment reversed and cause remanded.

We concur: MORRISON, C. J.; MYRICK, J.; SHARPSTEIN, J.; ROSS, J.

64 Cal. 515

S. P. R. Co. v. GARCIA.

Filed January 30, 1884.

The publication and approval of a survey by the United States surveyor, in the absence of an application to have it returned to the district court, has the same effect and validity in law as if a patent for the land so surveyed had been issued by the United States surveyor; after that it is in no sense *sub judice*.

The demanded premises are not within the exterior boundaries of the private grant in question, which, after the survey, became segregated from lands outside of the survey, and there being no other claim to them besides that of the plaintiff, his claim must be allowed.

In Bank.

Glassell & Smith, for appellant.

H. T. Hazard, for respondent.

SHARPSTEIN, J. If the demanded premises were not on the thirteenth day of April, 1871, (the date of the withdrawal from sale, etc., of public lands granted to the plaintiff), within the exterior boundaries of a Mexican grant, (the Tajauta,) the plaintiff is entitled to recover in this action, and the judgment and order appealed from must be reversed. The defendant did not settle on this land until December, 18, 1873, and if it had previously been withdrawn from sale, etc., it was not open for pre-emption, and the defendant, by virtue of said settlement, acquired no right to it as against the plaintiff. If this land at the date of said withdrawal was within the exterior boundaries of a Mexican grant, the grant to the plaintiff did not include it, and the patent which purports to convey the title to it to the plaintiff is invalid for that purpose. *Carr v. Quigley*, 57 Cal. 394; *McLaughlin v. Heid*, 10 Pac. C. L. J. 80.

It appears that the rancho Tajauta was surveyed in 1858 by Henry Hancock, deputy United States surveyor, and the survey approved on the seventeenth of September, 1860. At the time of such approval the act of June 14, 1860, entitled "An act to amend an act entitled 'An act to define and regulate the jurisdiction of the district courts of the United States in California in regard to the survey and location of confirmed private land claims,'" was in force. The act provides "that whenever the the surveyor general of California shall, in compliance with the thirteenth section of an act entitled 'An act to ascertain and settle [the] private land claims in the state of California,' approved March third, eighteen hundred and fifty-one, have caused any private land claim to be surveyed, and a plat to be made thereof, he shall give notice that the same has been done, and the survey and plat approved by him, by a publication * * * once a week for four weeks in two newspapers, one published in Los Angeles, and

one of which the place of publication is nearest the land." It further provides that the district court of that district may, upon the application of any party interested, make an order requiring such survey to be returned into said court for examination and adjudication, and, if in its opinion the location and survey are erroneous, it may set aside and annul the same, or correct and modify it. But if, "after publication as aforesaid, no application shall be made to the said court for the said order, or when said order has been refused, or when an order shall have been obtained as aforesaid, and when the district court, by its decree, shall have finally approved said survey and location, or shall have reformed or modified the same, and determined the true location of the claim, it shall be the duty of the surveyor general to transmit, without delay, the plat or survey of the said survey to the general land-office, and the patent for the land as surveyed shall forthwith be issued therefor, and no appeal shall be allowed from the order or decree, as aforesaid, of the said district court, unless applied for within six months from the date of the decree of said district court, but not afterwards; and the said plat and survey, so finally determined by publication, order, or decree, as the case may be, shall have the same effect and validity in law as if a patent for the land so surveyed had been issued by the United States." 12 U. S. St. at Large, 33. It does not appear that any application was made to have said location and survey returned into court, and it therefore became final; "and the said plat and survey so finally determined by publication" had "the same effect and validity as if a patent for the land so surveyed had been issued by the United States." *Id.*

Speaking of the effect of this act, the United States attorney general said: "It is perfectly clear that, this publication having been made, and no steps having been taken to invoke the jurisdiction of the district court, the title to this land, as covered by the survey and plat, vested absolutely in the claimant, and that the repeal of the statute, after the title so vested, cannot be construed to have divested that title." 12 Op. Attys. Gen. 250.

Therefore the finding that the demanded premises were within the exterior boundaries of the private grant Tajauta, and were claimed as a part of said grant, and that said claim was pending before the land department of the United States at the date of the defendant's settlement, is not supported by the evidence. The publication and approval of the Hancock survey, in the absence of an application to have it returned to the district court, had the same effect and validity in law "as if a patent for the land so surveyed had been issued by the United States." After that the grant was in no sense *sub judice*. It was the duty of the surveyor general to transmit said survey to the general land-office, and of that office to forthwith issue a patent for the land in accordance with said survey. The grant became segregated from lands lying outside of said survey. As that occurred more

than 10 years before the lands granted to the plaintiff were withdrawn from sale, etc., it follows that the grant of the plaintiff attached to the demanded premises, unless the defendant had previously initiated some claim thereto. And it does not appear that he attempted to do so until about two years after the right of plaintiff had attached.

Judgment and order reversed.

We concur: MYRICK, J.; McKINSTRY, J.; MORRISON, C. J.; McKEE, J.

I concur in the judgment: Ross, J.

64 Cal. 513

TAYLOR v. McCLAIN.

Filed January 30, 1884.

Where an action is brought to have a deed absolute in form declared a mortgage, and to redeem the same, the defendant, who asserts by cross-complaint that the deed is not a mortgage, but an indefeasible conveyance, is entitled to maintain the cross-action at law in ejectment to the plaintiff's action in equity, and upon the establishing of the case is entitled to a judgment for the possession of the premises.

In Bank.

Bicknell & White, Smith & Brown, and A. H. Hutton, for appellants.

Barclay & Wilson, and Brunson & Wells, for respondent.

BY THE COURT. 1. When this case was here before we held the action to be to redeem a mortgage, and as such it was barred by the statute of limitations. *Taylor v. McClain*, 60 Cal. 652. On the return of the cause to the court below the complaint was not amended, and it is the law of the case that the complaint is to redeem. On the last trial below the court held that more than four years had elapsed after the maturity of the indebtedness from plaintiff to defendant before this action was commenced. There was, therefore, no pleading on the part of plaintiff, on which the court was authorized to base its decree quieting the plaintiff's title and possession and enjoining the defendants from asserting any claim to the premises.

2. The court below also decreed that the defendant was not entitled to maintain "a cross-action at law in ejectment to plaintiff's action in equity," etc. We think that when an action is brought to have a deed absolute in form declared a mortgage and to redeem the same, the defendant, who asserts by cross-complaint that the deed is

not a mortgage, but a conveyance indefeasible, may ask, and if he maintains his averments by proof, (or plaintiff fails to establish his case,) is entitled to a judgment for possession of the premises. He seeks "affirmative relief relating to the transaction upon which the action is brought." Code Civil Proc. § 442. The section is broader, and authorizes defendant to file a cross-complaint whenever he seeks affirmative relief "affecting the *property* to which the action relates." This would seem to permit the assertion of a title independent of and paramount to that which the plaintiff had when he executed his deed. *Non constat*, in the case at bar, so far as appears from the cross-complaint, that the defendant claims to deraign title from the plaintiff.

3. The court erred, therefore, in refusing to consider the cross-complaint. If on the trial of the issues made by the cross-complaint and the answer thereto it had appeared that the defendant claimed title only under the deed from plaintiff to Mayes, and that said deed was executed only as security for an indebtedness from plaintiffs to defendant, the court below would have been justified in finding that the legal title did not pass from plaintiffs. If a deed absolute in form is given only to secure a debt, it is to be deemed a mortgage as between the parties thereto, and as to subsequent purchasers with notice. Civil Code, 2924, 2925. The sections of the Civil Code—and it was so declared by the Code commissioners—were intended to restore the rule laid down in *Cunningham v. Hawkins*. Ann. Code, 2925. In *Cunningham v. Hawkins*, 27 Cal. 604, it was held parol testimony is admissible to prove a deed absolute in form to have been intended as a mortgage in actions *at law* as well as in equity.

4. From what has been said above, it follows that the defendant should have had judgment in the court below as to the action to redeem, as the action was barred by the statute, but that the court should have proceeded to try the action in the nature of ejectment. On the return of the case to the court below, the parties will, of course, have an opportunity to make application for leave to amend their pleadings in such a manner as they may be advised, and it will be for that court to deny such applications or to grant them with or without terms.

Judgment reversed and cause remanded for new trial.

TAYLOR v. McCLAIN.

Filed January 30, 1884.

In Bank.

*Bicknell & White, Smith & Brown, and A. H. Hutton, for appellant.**Barclay & Wilson and Brunson & Wells, for respondent.*

BY THE COURT. On authority of *Taylor v. McClain*, ante, 399, order reversed, and new trial granted.

64 Cal. 512

DALY v. AH GOON and others.

Filed January 30, 1884.

Tax sale—notice—recitals in deed.

Department 2.

*John R. Jones, for appellant.**Conklin & Hunsaker, for respondent.*

BY THE COURT. The only question in this case, which it is necessary for us to decide, relates to the validity of a certain tax deed offered in evidence by defendants. The action was ejectment, and the plaintiff made out a *prima facie* case. To defeat his right of recovery defendants relied upon a sale of the land for taxes and a deed in pursuance of such sale. The certificate of sale shows that the lot in controversy was assessed to G. A. Hemenway, and to all owners and claimants known and unknown. It has been held in several cases that such an assessment is void, and the question is, does such a void certificate affect and defeat a deed, valid upon its face? We think it does. Section 3786 of the Political Code requires that "the matters recited in the certificate of sale *must* be recited in the deed, and *such* deed, duly acknowledged and proved, is primary evidence." This requisition of the statute must be complied with. *Grimm v. O'Connell*, 54 Cal. 522; *Anderson v. Hancock*, ante, 31. If the deed offered in evidence in this case had followed the law, and contained the recitals found in the certificate, it would have been void on its face, and it was competent for the plaintiff to defeat it by evidence *aliunde*.

The motion to dismiss the appeal was denied October 10, 1883.

Judgment and order reversed.

v.2,no.3—26

CITY AND COUNTY OF SAN FRANCISCO v. PHELAN.

Filed January 30, 1884.

In Bank.

Sawyer & Ball, for appellants.*J. P. Bell*, for respondent.

BY THE COURT. The questions presented in this case are the same as those passed on in *City and County of San Francisco v. Flood*, ante, 264, and the judgment in that case determines this.
Judgment and order affirmed.

CITY AND COUNTY OF SAN FRANCISCO v. SHARON.

Filed January 30, 1884.

In Bank.

J. P. Bell, for respondent.*Lloyd, Newlands & Wood*, for appellant.

BY THE COURT. The questions presented in this case are the same as those passed on in *City and County of San Francisco v. Flood*, ante, 264, and the judgment in that case determines this.
Judgment and order affirmed.

64 Cal. 525

Ex parte SONTAG.

Filed January 31, 1884.

A grand juror cannot be compelled to disclose how he or any other juror voted upon an indictment, but he may be required to give the testimony of a particular witness in a matter before them.

In Bank.

Darwin & Murphy, for petitioner.*Tyler & Fluornoy*, for respondent.

McKINSTRY, J. The petitioner was committed to prison by the superior court, as being guilty of contempt in refusing to answer the question (upon motion to set aside an indictment) whether he as grand juror voted for finding the indictment. The form of the oath in general use for centuries binds the grand juror to preserve inviolate the secrets of the grand jury room. Public policy would seem to forbid vain disclosures made to gratify idle curiosity. "But," says Thompson and Merriam, "when for the purposes of public justice, or for the protection of private rights, *it becomes necessary*, in a court of justice, to disclose the proceedings of the grand jury, the better authorities now hold that this may be done. It is obvious that there are certain transactions of the grand jury room which it can never be for the interests of justice to disclose; for example, *what particular jurors* concurred in or opposed the finding of the indictment, what opinions were expressed by various members of the body. In respect to such matters the injunction of secrecy may well be perpetual." *Thomp. & M. Jur.* § 703.

The furthest any of the cases cited by the text-writers, from whom we have quoted, have gone towards permitting an inquiry by means of the testimony of grand jurors themselves into the mode of finding an indictment, is to allow the question, did 12 grand jurors concur in finding the indictment? Thus, in *Low's Case*, 4 Me. 439, that question was permitted, but both the judges who delivered opinions in that case were careful to exclude any inference that it would be proper to inquire how a particular juror voted. WESTON, J., said: "The oath of the grand juror requires him to keep secret the state's counsel, his fellows, and his own. Of this character may be, what particular jurors agreed or dissented upon the questions whether a true bill or not. * * * But the fact whether 12 or more concurred or not in the bill is *not a secret*. It is a result which they are required, through their organ, the foreman, to make known." And PREBLE, J., added: "*How* any juror voted is a secret no juror is permitted to disclose; but whether 12 of their number concurred in finding a bill is *not a secret* of the state, their fellows, or their own. It is a fact they of necessity profess to disclose every time they promulgate their decision upon any bill laid before them." The supreme court of Maine in effect held that the fact whether 12 concurred in finding an indictment could be inquired into by the testimony of the grand jurors, on motion, but that, in pursuing such inquiry, the grand juror could not be required to state whether he voted for or against the indictment. In other courts, however, the inquiry has been limited still more. "By such courts grand jurors will not be permitted to testify whether they voted at all, how they or their companions voted, or whether 12 concurred in the finding." *Thomp. & M. Jur.* § 704, and cases cited in note.

No case has been called to our attention in which it has been held that a grand juror could be compelled to answer how he voted with

respect to the finding of a particular indictment. In this state the whole matter is regulated by statute. The oath of the grand juror is: "You will keep your own counsel and that of your fellows and of the government, and will not, except when required in the due course of judicial proceedings, disclose the testimony of any witness examined before you, nor anything which you or any other grand juror may have said, nor the manner in which you or any other grand juror may have voted on any matter before you." Penal Code, 903.

Section 926 of the Penal Code reads: "Every member of the grand jury must keep secret whatever he himself or any other grand juror may have said, or in what manner he or any other grand juror may have voted on a matter before them; but may, however, be required by any court to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before them by any person, upon a charge against such person for perjury in giving his testimony upon trial therefor."

Section 926 specifies the exceptional cases in which a court may require a grand juror to disclose any matter transpiring in the jury-room, and provides that he must keep secret other matters, including "in what manner he or any other grand juror may have voted on a matter before them." Reading together sections 903 and 920, it is apparent that the exception stated in the former section is intended to apply only to the clause which immediately succeeds it—"You will not, except *when required* in the due course of judicial proceedings, disclose the testimony of any witness examined before you, nor [will you disclose] anything which you or any other grand juror may have said, nor the manner in which you or any other grand juror may have voted," etc. Thus read, the *subsequent* section, 926, may be given its effect; the last clause specifying the matters with respect to which a grand juror *may be required* to make disclosure "in the due course of judicial proceedings." The inquiry must be confined to such matters, that is to say, the grand juror can only be required to state what was the testimony of a witness examined before the grand jury.

It has been argued with much ingenuity that the provision of the law, which authorizes a motion to set aside an indictment where it has not been "found" as prescribed by the Code, is of no benefit to a defendant unless he is permitted to prove that it was not duly found by the testimony of the grand jurors themselves, who are alone present when an indictment is voted upon. Penal Code, 995. It is contended that the right to move on the ground that the indictment was not properly found, necessarily includes the right to prove the fact by the testimony of those only who can know the fact. But there are many legal rights which cannot be established by certain witnesses. Thus it is well settled that a petit juror cannot impeach his verdict, although a defendant may move for new trial on the ground of unfairness in its rendition. *People v. Wyman*, 15 Cal. 70. We can

imagine cases in which it might be possible to prove that less than 12 voted for an indictment without resorting to the testimony of the grand jurors themselves. The mere inconvenience or difficulty of proving the fact ought not to overrule the many grave objections to a procedure not only not directly authorized, but expressly forbidden by the Code, which may interfere with the complete freedom of exposure of alleged offenses which it is the design of the institution of grand juries to secure, and conflict with other principles of public policy which are subserved by keeping inviolate the secrets of the grand jury room—except when their disclosure is absolutely necessary. No serious injury can arise from prohibiting the question asked the petitioner. The cases must be rare indeed in which a foreman will dare attempt to practice fraud upon his fellow jurors by indorsing and presenting a bill not in fact found, and if such a fraud is practiced the law will provide a proper punishment by direct proceedings against the party guilty of the fraud.

Finally, as said by RYLAND, J., in *State v. Baker*, 20 Mo. 338, an innocent person will not be injured by limiting the inquiry, for he can always vindicate himself in a trial on the merits.

Let the petitioner be discharged from custody.

We concur: SHARPSTEIN, J.; ROSS, J.; THORNTON, J.; MORRISON, C. J.; MYRICK, J.; MCKEE, J.

The evidence in this case considered, and *held* insufficient to sustain the finding of the court that the defendant had authority from the plaintiff to make the repairs which he attempts to set off against the rent.

Department 2.

A. B. Hotchkiss, for appellant.

THORNTON, J. This action is brought to recover of defendant the value of the use and occupation of certain real estate situate in the city of San Diego, for a period extending from the seventeenth day of November, 1880, to the seventeenth day of May, 1881, and also for a period commencing with the day last named, and ending on the seventeenth day of August, 1881. Judgment was rendered for the defendant. There was a motion for a new trial by plaintiff, and an order denying it. Thereupon plaintiff appealed from the judgment and order.

The facts of the case as found by the court below are these: On the second day of August, 1880, a judgment was rendered in the superior court for the city and county of San Francisco, in an action brought by the plaintiff herein against A. E. Horton and others, defendants, among whom was the defendant herein, in favor of plaintiff and against the defendants for the foreclosure of a mortgage made by Horton in favor of plaintiff on the eighth day of December, 1873, upon the property described in the complaint herein. On the nineteenth day of October, 1880, an execution was issued on the judgment, and placed in the hands of the sheriff of San Diego county, who, by virtue of the same, on the seventeenth day of November, 1880, sold, according to law, the property above mentioned to the plaintiff, gave it a certificate of sale therefor, and on the next day filed a duplicate of the certificate in the recorder's office of the county just named. The defendant had notice of this judgment and sale. He used and occupied the premises from the seventeenth of November above mentioned to the seventeenth of May, 1881, which use the court finds was of the value of \$50 per month. The court also finds that plaintiff was the owner of the property from the seventeenth of May, 1881, to the eighteenth of August, 1881, (having become such by the acquisition of the sheriff's deed on the sale above mentioned, as shown by the testimony,) and that during said period last named the defendant occupied the premises by permission of the plaintiff, and that the use of the property during such period was worth \$300; that Horton was the owner of the property from the twenty-third of December, 1876, to the seventeenth of May, 1880; that on the said twenty-third day of December he leased the same to the defendant for the period of two years thereafter, at the rental of \$50 per month, and on the fourteenth of April, 1880, he extended this lease to the first of May, 1881, on the same terms, and received the rents for the property up to the day last named; that on the thirtieth of July, 1879, defendant notified the plaintiff that the buildings on the property had become dilapidated, and that many necessary and permanent repairs were necessary to be made to preserve the building (the Horton House) on the property and make it habitable, and demanded of the plaintiff that it should make such repairs.

The court then proceeds to find that the plaintiff failed to make these repairs, but thereafter, on the eleventh day of August, 1879, and at divers and sundry times between the day named above and the eighteenth day of August, 1881, the plaintiff authorized and directed the defendant to make all necessary repairs on the premises on its account, the value of such repairs, however, not to exceed the value of the rents of the premises; that the value of the rents during said period up to the seventeenth of May, 1881, was \$50 per month, and for the three months thereafter \$100 per month; that at divers and sundry times between the eleventh of August, 1879, and the eighteenth of August, 1881, the defendant, by the authority of the

plaintiff as above stated, made necessary repairs on the premises of the value of \$1,400, of which the plaintiff has paid no part. The court set off these repairs against the use and occupation of the premises during the periods mentioned in the complaint, and gave defendant judgment for costs.

It is urged here by plaintiff that there was no direction or authority to make these repairs given to any one by it, as found by the court, and that the evidence is insufficient to sustain such finding. We are of opinion that this contention is maintained. The evidence relied on to sustain the finding consists of a letter from E. F. Northam, vice president of the plaintiff to the defendant, bearing date the eleventh day of August, 1879, and the testimony of defendant and Horton. It will be observed that Northam's letter bears date nearly a year before the judgment was rendered in the foreclosure suit, when the plaintiff was not the owner of the property, and no one could say with any certainty that it would ever become the owner. Horton was the owner and landlord of defendant, and was in San Diego, where this property was situated and where defendant resided. This letter was in reply to one from the defendant in relation to these repairs. So far as it refers to this subject its contents are as follows: "The mortgage covering the Horton House does not authorize the making of repairs. It is not yet in judgment, owing to delay in serving some defendants, but probably will be soon. Until sale under the judgment it is not certain that this bank will become the owner. In the mean time the bank is not disposed to meddle with the affairs of the house; but against the rent or use I should think you might make the mentioned repairs." The defendant says in his testimony: "I was governed by this letter all the time." We cannot see in the words above quoted any authority to make these repairs. On the contrary, there is a careful avoidance of committing plaintiff to any such authority. The last clause in the letter gives utterance to an opinion of the writer speaking for himself and not for the plaintiff, and this certainly does not bind the plaintiff or give any direction on the subject to which it pertains.

Except the above letter, no communication appears to have been had with plaintiff until after the sale under the foreclosure judgment, which, as seen above, occurred on the seventeenth of November, 1880. Horton testified that he saw the directors in relation to this property after the sale took place. At that time most of the repairs had been made. The account presented by the defendant showed that the repairs made when the sale took place amounted to about \$1,650. The conversation between Horton and the directors was in regard to the condition of the property. The repairs that had been made by defendant were spoken of. But we do not find in this conversation any authority to any one to allow for such repairs, or to authorize any to be made. Horton did not pretend to act for the defendant. It does not appear that he had any authority to act for him. Nor does it

appear that he was authorized by the plaintiff to act for it in making any agreement with defendant, as to repairs, or that he ever did act for it or assume to act for it in any way. There is no testimony whatever that he ever communicated the conversation had with the directors to the defendant. The conversation shows no admission by the directors that the plaintiff was bound for any such repairs or had in any way authorized them, or ever intended to authorize any repairs to be made. Besides, a corporation does not usually act in such a loose manner in making contracts. They are usually made by a resolution of the board of directors, adopted and entered in their minutes. This testimony of Horton is too loose and unsatisfactory on which to charge the plaintiff.

As to the testimony of the defendant. He never saw the president and directors of plaintiff until May, 1881. In his conversation with them no agreement was come to. He states that they refused him a lease, and further stated: "The house needed repairing, and they wanted to know what the expense would be. I showed them a statement which made it come to three or four thousand dollars. They said that was more money than they would spend. I said, 'We can't do it for much less; come down and look at the premises.' And they promised they would send a man down. Mr. King promised faithfully that he would come. Mr. Boswell, who was a director, came on the fourth of July. He said he would give no lease, and he had come down specially about this property." But it nowhere appears that Boswell had any authority from the plaintiff to allow for repairs already made, or to direct repairs to be made. It would not be a just inference from Boswell's saying that "he had come down specially about this property" that he had any such authority. Besides, Boswell's authority could not be proved by his declarations. Such evidence is not admissible to prove an agent's authority. If it tended to prove his authority the plaintiff moved to strike it out, and excepted to the ruling of the court denying the motion. So far as it proved any authority in Boswell to act in regard to repairs, the court erred in letting it in.

There is testimony by defendant that in the conversation deposed to by him, they (the directors) said they would allow him to spend \$500 on the sewer. How much was spent on the sewer does not appear in the findings, and does not clearly appear in the testimony. Nor does it appear at all whether this allowance of \$500 referred to repairs on the sewer made before this conversation or to such as should be subsequently made. Under these circumstances we cannot discern if any allowance should be made for repairing the sewer, or what this sum should be. We cannot therefore direct what judgment should be entered.

The result to which we are led by the foregoing is that the finding of the court as to the authority of defendant to make these repairs above stated is not sustained by the evidence, and a new trial must

therefore be directed. In this state of the case we do not think it necessary to pass on the other questions argued.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: MYRICK, J.; SHARPSTEIN, J.

64 Cal. 519

PACIFIC BRIDGE Co. v. KIRKHAM.

Filed January 31, 1884.

Department 1.

C. T. Botts, for appellant.

Vrooman & Davis, for respondents.

BY THE COURT. The principal point argued by counsel for appellant is that under the principle established by the case of *People v. Lynch*, 51 Cal. 15, the act of the legislature entitled "An act to authorize the city of Oakland to construct a bridge across the estuary of San Antonio, between Eighth street and East Ninth street," approved April 1, 1876, is unconstitutional and void. To this we are unable to assent. Nor can we say that the evidence is insufficient to sustain the findings of the court below.

Judgment and order affirmed.

CITY AND COUNTY OF SAN FRANCISCO v. FLOOD.

Filed January 30, 1884.

In Bank.

Lloyd, Newlands & Wood, for appellants.

John P. Bell, for respondent.

BY THE COURT. The questions presented in this case are the same as those passed on in *City and County of San Francisco v. Flood*, ante, 264, and the judgment in that case determines this.

Judgment and order affirmed.

Cal.Rep. 1-4 P.—10

CITY AND COUNTY OF SAN FRANCISCO v. BALDWIN.

Filed January 30, 1884.

In Bank.

Lloyd, Newlands & Wood, for appellant.*J. P. Bell*, for respondent.

BY THE COURT. The questions presented in this case are the same as those passed on in *City and County of San Francisco v. Flood*, ante, 264, and the judgment in that case determines this.

Judgment and order affirmed.

2 Cal. Unrep. 255

DUANE v. NEUMANN.¹

Filed January 31, 1884.

In Bank.

THORNTON, J., *dissenting*. I dissent. In my judgment, all the issues raised by the pleadings were found upon by the court below. The plaintiff in his complaint set up a contract with certain terms, and Neumann denied the allegations in regard to it, and set up one with different terms as the only contract entered into by himself and plaintiff. Thus was issue joined. There was only one contract involved in the case, and the court below in its findings affirmed what the contract was; in other words, found it with all its terms. Moreover, the contract was entered into on an assignment made by plaintiff to defendant, Neumann, and the court in its findings particularly specifies the contract affirmed by it as the one made in consideration of such assignment. Now, was it necessary for the court to go further and find that the contract affirmed by it was the only contract entered into by the parties, *and that there was no other*? I think not. By finding the contract specifically as above stated, it in effect found that there was no other. *Coveny v. Hale*, 49 Cal. 556.

I think the judgment and order should be affirmed.

¹See majority opinion, ante, 274.

65 Cal. 11

URTON v. WILSON.

Filed February 2, 1884.

Where a party, not an actual settler, applies for the purchase of land, but is not in possession thereof and has paid nothing, he acquires no rights that the state cannot annul, and upon the subsequent adoption of a constitution he must bring himself within the provisions of the constitution that relate to such purchases. His application is void as against a purchaser who has made part payments, whether the application of such other purchaser be perfectly valid or not.

Department 2.

Stetson & Houghton, for appellant.

Graves & Chapman, for respondent.

MYRICK, J. A controversy arose before the surveyor-general of the state as to the conflicting claims of plaintiff and defendant regarding the purchase from the state of certain lands, which controversy was by the surveyor-general referred to the court below for determination. The land was surveyed by the United States and listed to the state, and thereafter, July 14, 1870, Wilson made application to purchase, April 25, 1872. His application was approved, and June 4, 1872, he made the first payment of the purchase money, and received the register's certificate. On the twentieth of September, 1878, the plaintiff filed his application to purchase, and demanded that the controversy be sent to the proper court for adjudication. The plaintiff was not in possession, and has paid nothing. The plaintiff claims that defendant's application was invalid, on the ground that there was no law in force at the date of that application for the sale of land in lieu of the sixteenth and thirty-sixth sections lost to the state. The land is the west half of a section 28. For the purposes of the controversy between the plaintiff and defendant it is necessary only to say that plaintiff has no right to purchase the land. Section 3, art. 17, of the constitution of this state declares: "Lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers, and in quantities not exceeding three hundred and twenty acres to each settler, under such conditions as shall be prescribed by law." The plaintiff was not an actual settler. It is true, he made his application before the constitution was adopted, but he thereby acquired no rights which the state could not annul; he had paid nothing. This question was directly considered and passed on in *Johnson v. Squires*, 55 Cal. 103. So long as the statute remained in force, the plaintiff's application might have been entitled to be considered, if defendant's application was void; but when the statute was modified by the constitution, he was obliged to bring himself within the constitutional provision. We note, as referring,

in principle, to the plaintiff's case, what is said by the court (by SAWYER, C. J.) in *Hutton v. Frisbie*, 37 Cal. 490-498, regarding pre-emption laws and the effect of their repeal.

In one of the briefs filed on behalf of appellant the attorneys who prepared the same were unfortunate in not having carefully considered some of the cases cited, or in their construction of the decisions. In speaking of the decision in *Johnson v. Squires*, 55 Cal. 103, counsel said: "All that the court said about the effect of the new constitution upon the judgment was *obiter dicta*. There were no facts before the court upon which the constitutional question could be decided." Let us see what the opinion of the court says. After holding that the defendant's application was not good, the court, *in terms*, and upon the ground that plaintiff was not in possession and had paid nothing, applied to his application the provision of the constitution, and held that under it the land could be granted only to an actual settler; and, thereupon, holding that defendant's application was invalid, and that plaintiff could not, under the constitution, purchase the land, reversed the judgment which had been rendered in favor of defendant, and declined to enter judgment for plaintiff, (although his application was correct in form,) and sent the case back for the parties to make such applications to amend their pleadings as they should be advised. How could counsel say "there were no facts before the court upon which the constitutional question could be decided," when the right of plaintiff to judgment turned upon that very question?

The counsel say: "In *Medley v. Robertson*, 55 Cal. 396, this court held that an application made prior to the adoption of the new constitution was not affected by its provisions." Referring to the opinion, and to the transcript and briefs, we find that the subject was not alluded to. The only questions decided in that case were as to when land should be deemed surveyed, and when the title to a particular sixteenth and thirty-sixth section vested in the state.

In citing *Pollard v. Putnam*, 54 Cal. 631, counsel say: "Plaintiff, an adverse applicant, had gone into possession, and article 17 of the new constitution was invoked in his favor and cited in the briefs; but the court decided in favor of defendant, virtually holding that the new constitution had nothing to do with the case." In the briefs filed before the decision in that case in department, the constitutional provision was not referred to; neither was it mentioned by the court. After the decision in department, a substitution of attorneys took place, and the incoming attorney, filing a petition for a hearing in bank, raised the question. A hearing in bank was denied, presumably for the reason that the court would not entertain questions raised in petitions therefor for the first time, on the ground that counsel should at first present their cases in this court in full and not piecemeal. In denying the hearing in bank, the court modified the judgment in department by sending the cause back for a new trial,—it

may be, for the very purpose of permitting the constitutional question to be raised in the court below.

Citing the case of *Laugenour v. Shanklin*, 57 Cal. 76, counsel say: "In a similar case, this court in bank said: 'Section 3 of article 17 of the present constitution has no application, for the reason that the rights of the petitioner attached to the land long prior to its adoption.'" Why did this court, in *Laugenour v. Shanklin*, say the present constitution had no application? Because, as counsel will observe, by reference to the facts of the case, the state had sold to Laugenour two land-warrants, and Laugenour had paid \$650 therefor into the state treasury, and when he made his application to purchase the land in controversy he *surrendered these warrants to the state*, thus paying for the land the price at which and in the mode through which the state had agreed to sell it.

We fail to see a single element, in either of these cases, to sustain the proposition on behalf of which they were cited.

As the state is not a party to this proceeding, it is not necessary to express any opinion as to the validity of the defendant's certificate; it is sufficient to say that the plaintiff has no right, and that the controversy, as between the two, should be decided against him.

The judgment of the court below, so far as it is against the plaintiff, and in favor of defendant for costs, is affirmed. In other respects we express no opinion.

We concur: SHARPSTEIN, J.; THORNTON, J.

65 Cal. 17

GLEASON v. HILL.

Filed February 2, 1884.

The ditches in question are so connected that they might constitute one parcel, and the opinion of the trial court that they were so connected, and could be sold as one parcel, under execution, will not be disturbed.

Department 2.

Hale & Craig, for appellant.

C. A. & C. Tuttle, for respondents.

SHARPSTEIN, J. The Code provides that "when the sale (under execution) is of real property, consisting of several known lots or parcels, they must be sold separately." Code Civil Proc. 694. In this case the property, which consisted of four ditches and the water rights connected therewith, was sold in one parcel. The appellant contends

that each ditch and the water right connected with it constituted a separate lot or parcel of real property, and should have been so sold. On the other side, it is insisted that the several ditches and the water rights connected with them constitute a system of water supply, all connected, as shown by a diagram accompanying the transcript, and that if divided or sold in parcels and owned by different parties the branch between two of them, which cost over \$3,000, would be useless, and that, owing to the character of said ditches and their connections, it would be difficult to bid on the same in parcels or fix a price upon the separate parcels. The court below, having refused to set aside the sale, must be presumed to have taken that view of the matter; and unless we could clearly see that the view so taken was erroneous, the order appealed from ought not to be disturbed. The question whether said ditches constituted one or several parcels of real property was one of fact, upon which the evidence was conflicting. The ditches are so connected that they might constitute but one parcel, and, according to the allegations of the respondent, such is the fact.

Order affirmed.

We concur: MYRICK, J.; THORNTON, J.

65 Cal. 28

TYLER *v.* CONNOLLY.

Filed February 5, 1884.

There is no right of appeal from a judgment for contempt, and no stay of proceedings to be had. If the power to commit or fine for contempt is exercised tyrannically, the case may generally be remedied by *habeas corpus*, or by *certiorari*.

In Bank.

Geo. W. Tyler, in pro. per., for petitioner.

J. D. Sullivan, for respondent.

THORNTON, J. This is an application made to this court to prohibit the sheriff from proceeding to execute the judgment rendered against George W. Tyler in a proceeding against him for a contempt. The prohibition or stay is asked for on the ground that Tyler has taken an appeal from the judgment of contempt above mentioned, has perfected his appeal by giving the undertaking required by law, and that such undertaking operates as a stay; that, nevertheless, steps have been taken to execute the judgment. If the judgment of contempt is appealable, the moving party is entitled to a stay. The

appellate jurisdiction of this court is conferred on it, and is defined by the constitution. It has such jurisdiction "in all cases in equity except such as arise in justices' courts; also in all cases which involve the title of possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars; also in cases of forcible entry and detainer, and in proceedings in insolvency, and in actions to prevent or abate a nuisance, and in all such probate matters as may be provided by law; and also in all criminal cases prosecuted by indictment or information in a court of record on questions of law alone." Const. art. 6, § 4.

It is argued that because the judgment against Tyler exceeds \$300, that the appeal is given by the constitution. But the constitution does not give an appeal in all cases where the judgment exceeds \$300; it gives it only when the demand, exclusive of interest, exceeds that sum. There was no demand for any sum in the proceeding against Tyler. The demand made appears in the pleadings,—either in the complaint or answer. *Dashiell v. Slingerland*, 60 Cal. 653.

We know of no demand for a sum of money in a proceeding for a contempt. The law does not require or authorize such demand to be made. It would be most unusual to make it; and, if made, it would be entirely unnecessary and without avail. The contention on the ground stated cannot, in our opinion, be maintained.

It has been held by this court that a proceeding for contempt is a criminal case, (*Ex parte Crittenden*, 62 Cal. 534;) but as it is not prosecuted by indictment or information, its character as a criminal case furnishes no ground for an appeal. The constitution expressly limits appeals to criminal cases prosecuted in the mode above stated. We find no warrant in the constitution for an appeal in a proceeding for contempt.

Conceding that the legislature may confer appellate jurisdiction on this court in cases not provided for in the constitution, we have been referred to no statute giving the right to appeal from a judgment in a contempt case. On the contrary, in our judgment, such right is withheld by section 1222, Code Civil Proc. That section is as follows: "The judgment and orders of the court or judge made in cases of contempt are final and conclusive." In *Houghton's Appeal*, 42 Cal. 35, these words "final and conclusive," in a statute in regard to a judgment of the county court, were held to deny an appeal from such judgment. It may be added here that it was conceded, on the argument, that an appeal was not given by statute.

The conclusion here reached is sustained by the reasoning in *Huerstal v. Muir*, 62 Cal. 479. In *People v. O'Neil*, 47 Cal. 109, we think the court mistook the law in holding that the judgment in that case (which was one for contempt) was appealable. No authority is referred to in the opinion to sustain such a rule, nor is any law, con-

stitutional or statutory, granting a right of appeal, referred to or cited. We think a sounder conclusion on this subject was reached by the learned justice (CROCKETT) who wrote the opinion in the case above cited, and another justice (RHODES) in *Aram v. Shallenberger*, 42 Cal. 275-279. What is said in *Ex parte Hollis*, 59 Cal. 408, as to an appeal, is mere *dictum*. We are of opinion that *O'Neil's Case* does not properly declare the law on the point under discussion, and should be overruled. See *Larrabee v. Selby*, 52 Cal. 508. The cases cited from New York — *Sudlow v. Knox*, 7 Abb. Pr. (N. S.) 411, and *Erie R. Co. v. Ramsey*, 45 N. Y. 637,—throw no light on the subject discussed, as the decisions in those cases were made on statutes entirely different in their provisions from the provisions of the constitution and statute governing the matter in this state.

The motion must be denied; and it is so ordered.

We concur: MCKINSTRY, J.; MYRICK, J.; SHARPSTEIN, J.; ROSS, J.

MORRISON, C. J., *concurring*. By the order of the superior court of San Francisco the petitioner was adjudged guilty of a contempt of court, and was fined \$500. From this order or judgment petitioner has taken steps to appeal the matter to this court, and to that end has filed the notice and statement appropriate under proceedings on appeal. It is claimed that the right of appeal does not exist, and, notwithstanding petitioner's attempted appeal, steps are being prosecuted to collect the fine imposed in the matter of the adjudged contempt. Petitioner now asks this court for an order staying all proceedings under the order of the court below. The right to the order asked for depends upon the question whether an appeal will lie in this case. Section 1222 of the Code of Civil Procedure declares that "the judgment and orders of the court or judge in cases of contempt are final and conclusive;" and to give these words of the statute effect, it must be held that no appeal can be taken in such cases under the Code.

It is claimed, however, on behalf of the petitioner, that the right of appeal is a constitutional right,—not to be taken away by the legislature. If the premises are correct, the conclusion is equally so. But let us see if the right of appeal exists under the constitution. The appellate jurisdiction of the supreme court is fixed by section 4, art. 6, of the constitution, which reads: "The supreme court shall have appellate jurisdiction in all cases in equity except such as arise in justices' courts; also in all cases at law which involve the title or possession of real estate or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy amounts to three hundred dollars; also in cases of forcible entry and detainer, and in proceedings in insolvency, and in actions to prevent or abate a nuisance, and in all such probate matters as may be provided by law; also in all

criminal cases prosecuted by indictment or information in a court of record on questions of law alone."

In the case of *New Orleans v. Steam-ship Co.* 20 Wall. 392, the supreme court of the United States held that "contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing. The court can take cognizance of a criminal case only upon a certificate of division in opinion. In *Crosby's Case*, 3 Wils. 188, Mr. Justice BLACKSTONE said: 'The sole adjudication for contempt, and the punishment thereof, belongs exclusively and without interference to each respective court.'"

In the case of *Ex parte Crittenden*, 62 Cal. 534, the above case was followed by the present supreme court, and I see no reason to depart from the principle there stated. It follows, then, if the proceeding for contempt is in its nature a criminal proceeding, the right of appeal, under the constitution must be referred to that clause which authorizes an appeal in criminal cases. The language there found is the following: An appeal will lie, "also, in all criminal cases prosecuted by indictment or information in a court of record on questions of law alone." This is not such a case, and it can hardly be seriously contended that it comes within the language or meaning of the provision of the constitution above quoted. In denying the right of appeal under the circumstances of this case, we in no sense endanger the liberty of the citizen. If the power of punishing for contempt is exercised by a tyrannical court in an arbitrary or unjustifiable manner, there are other modes of relief provided by law. Such a case may be reached generally by *certiorari* or *habeas corpus*. The power is given for wise and salutary purposes, and the exercise of it by an upright and honest judge will but seldom occur in cases which do not demand a resort to this summary mode of punishment. To hold that the party in contempt may arrest the proceeding by appeal would be to defeat in a measure the object and end of the law in conferring the power.

I concur in the judgment of the court that there is no right of appeal.

64 Cal. 529

EMERIO *v.* ALVARADO.

Filed January 31, 1884.

When the time for filing a bill of exceptions is extended by the order of the court, the additional period begins to run from the end of the statutory limit of 10 days, and not from the date of the order.

Until final judgment has been made and entered, the judgment roll is not and cannot be required to be made, and an appeal from an interlocutory judgment will not be dismissed because the entire judgment roll is not brought up.

Where a ruling is erroneous, but is not injurious to any party, it furnishes no ground for reversal.

Under the practice act of 1851 the clerk was required to include the costs in the judgment, upon a sworn memorandum, furnished him within 24 hours after the rendition of the verdict, and he had no authority to enter the judgment, and then, at a subsequent time, insert the costs. Any execution under such a so-called judgment for costs would be void.

Where the only objection to receive a document in evidence goes to the legal effect thereof, it may be admitted for other purposes, provided such legal effect is not passed upon.

Section 373, Code Civil Proc., only applies to the original process issued, when parties are first brought into court, and not to those brought in as representatives or successors of parties deceased.

Where deeds are given and accepted in lieu of former conveyances, the parties claiming under the deeds are estopped from claiming the lands in the conveyances in lieu of which the deeds were given.

A judgment or order of the court below will not be reversed because the order appointing a guardian *ad litem* does not appear in the record. If the parties have been served, and have answered by their guardians, their appointment may be assumed. The defect is an irregularity, which may be redressed in the lower court on motion.

An attorney appearing as guardian, without an order appointing him, would be guilty of contempt for misbehavior, and would probably be subject to a proceeding for removal or suspension.

The facts found and the conclusions of law must be stated separately by the court in giving the decision. The finding as to the assessments in this case is defective in finding no specific facts on which a question of law can arise.

Where a map or other paper is referred to in a judgment as a material part of it, it should be identified by the judgment and made a part of it, and not referred to as a paper recorded elsewhere.

In the governor's grant of 1834, of the lands here sought to be partitioned, the term "herederos" comprises all those parties to whom the said land had been devised by the will of Francisco Castro, the first claimant thereto.

The governor made the grant to the parties entitled in the will, and according to its provisions, and, as he had the power to do so under the decree of 1824 and the regulations of 1828, it is unnecessary to decide the question of the validity of the will. Were a decision needed, it would sustain the will.

Where, after the death of a father, and before that of a mother, children die intestate and without issue, their property, under the Mexican law, would pass to the mother, and not to their brothers and sisters.

The evidence being conflicting, and the court below having found that a certain grantor was competent to execute a deed, such finding will not be disturbed.

Where, in a deed of conveyance releasing partition, the release is to take effect by the force of a future event, each party thereto will, upon the happening of the event, be estopped from controverting it, and assuming to hold what he has released by a bill paramount to that which he conveyed; but where the deed is not signed by all the persons named in it as parties, it is, until so signed, void,—a mere inchoate instrument, to become effective only when fully executed, as demanded by its terms.

No partition can stand where a larger tract is included in the partition than is included in the tract to be divided, and all titles dependent upon it must fall with it.

Where a partition of lands is sought, the court, before the matter is sent to referees to locate and allot the specific shares, must determine between whom, and in what proportion, the division should be made; the parties and their interests must be defined in the interlocutory decree. It cannot be left to the referees or commissioners to determine who the co-tenants or the parties claiming under them are, and what are their titles; the duties of these officers should be mainly, if not entirely, ministerial.

No appeal will lie simply from an order appointing a receiver, though upon an appeal from a judgment, which includes such an appointment, the reversal of the judgment will cause the appointment to fall with it. Where the order "grants an injunction and appoints a receiver," there is an appeal as to the injunction, and the appointment may stand or fall with it; but even where the appointing of a receiver operates as a restraint upon the rights of parties, still, if there are no restraining words, it is not an injunction, and is not appealable.

In this case, though the attempted partition of 1856 was void, still, if by the acts of parties thereto equities have grown up under it in favor of the parties to this action, their interests may be enforced and adjudicated in this proceeding when remanded.

Ross, J., dissents.

In Bank.

A. M. Crane and others, for plaintiffs.

B. S. Brooks and others, for defendants.

THORNTON, J. In this cause, which is an action for the partition of the San Pablo ranch, situated in the county of Contra Costa, and containing 17,938 59-100 acres of land, there are five appeals, prosecuted each by some of the defendants. Of these five appeals two are from the interlocutory judgment or decree, one from an order denying a motion for a new trial made by several defendants, and the other two are from an order appointing a receiver. We are asked to strike out the bill of exceptions, on the ground that the notice of motion for a new trial and the bill of exceptions were not filed or served within the time allowed by law, or by the court. The interlocutory judgment was filed on the fifteenth of July, 1878, and notice of the filing of the findings and entry of judgment was served on the parties and attorneys on the next day. Seven days afterwards, viz., on the twenty-third of July, the parties intending to move for a new trial obtained from the Hon. Samuel H. Dwinelle, the judge of the court below, the following order:

"Good cause appearing therefor, it is ordered that the time for the defendants, or any or each of them, to give notice of their intention to move for a new trial, and to serve a bill of exceptions, is hereby extended thirty days." No stipulation of attorneys, extending time, was asked or given, and no other order was asked or granted than the foregoing. The foregoing order was a valid one. Civil Code Proc. § 1054. On the twenty-fourth of August, 1878, the notice of motion

for a new trial was served, and on the same day the proposed bill of exceptions was served.

It is argued that the time was only extended by order of the judge 30 days from the the twenty-third of July,—the date of the order,—which would extend the time to the twenty-second of August, and therefore the notice of motion and bill of exceptions, which were served on the twenty-fourth of August, were too late by two days. We do not so construe the order. We think it extended the time 30 days from the end of the period of 10 days allowed by the Code of Civil Procedure, and that such was the intention of the learned judge who made the order. The parties intending to move had 10 days' from the sixteenth of July to give notice and serve their bill of exceptions. Code Civil Proc. § 650. This would bring the 10 days' period to a close on the twenty-sixth of July. The extension of 30 days would bring the end of the extended period to the twenty-fifth of August, and notice and bill were filed the day preceding, viz., on the twenty-fourth of August. The extension of time by the order referred to the 10 days' period as the point from which the extension was to run and be computed. The order must have been made within the 10 days, for the judge had no power to make it afterwards. No reference is made in the order to its date as the point from which the extension was to be computed, and we would be violating the rule made by the order of the learned judge of the court below were we thus to hold. We think the notice and bill were filed in time. See *Green v. Fawcett*, No. 5,074, March 21, 1876; *Clark v. Crane*, 7 Pac. L. J. 412. We will remark here that the cause had been a long time on trial; that the transcript consists of more than 1,700 pages; and certainly the judge would be disposed to allow all the time in his power to prepare and serve a bill of exceptions. Remarkable diligence was used in preparing and serving it within the time allowed.

It is further urged that the appeal should be dismissed because the entire judgment roll is not brought up. Conceding that, on an appeal from an interlocutory judgment in partition, the entire judgment roll, so far as it exists, is to be and can be brought up in the transcript on appeal, we remark that it is not the practice of this court to dismiss an appeal under such circumstances, when the defect can be readily cured on a suggestion of *diminution*. It is clear, however, that on such an appeal no judgment roll has been made up. No final judgment has been rendered, and until final judgment has been *made and entered*, the judgment roll is not and cannot be required to be made. Code Civil Proc. § 670. Before the *postea* and entry of judgment, according to what is known as the common-law procedure, the roll was known as the *issue roll*, or *nisi prius roll*; after the entry of judgment it was called the judgment roll. Booth, *Suits at Law*, 136, 142, 143; Steph. Pl. 81; Abb. *Law Dic. verb.* "Judgment Record or Roll," citing Smith, *Act. at Law*, 184. This, however, applied only to *cases at law*. No

judgment roll was known in courts of equity. The pleadings, process, deposition, orders of all kinds, upon being filed, and final decree when enrolled, in cases in chancery, went into and constituted the record.

The case before us, although courts of law had at an early period jurisdiction in cases of partition, (1 Story, Eq. Jur. 646-648,) partakes more of a case in equity. However, it is sufficient to say that no judgment roll is provided for by the procedure in this state until final judgment has been entered, and we do not see why the requirement contended for here should obtain. The appeal should not be dismissed on the ground referred to, and the motion is denied. If any party had desired any paper to be brought up, which would constitute a part of the record in the case when the roll is made up, and would be material on the examination and decision of the cause, on a suggestion or motion to that effect leave would have been granted. In holding that we will not dismiss the appeal because all the documents which constitute the judgment roll, when made up after the final judgment is made and entered, are not in the transcript, we do not intend to hold that the procedure by which questions are brought to the court for examination and review on appeal is otherwise changed. The same mode might be adopted to bring questions for review before this court on appeal from an interlocutory judgment in partition, as on an appeal from a final judgment. The same is true on appeal from a motion denying a new trial in the case of an interlocutory judgment. The questions to be considered and decided on the denial of such a motion, when an interlocutory judgment has been rendered and entered, must be brought before us by a statement or bill of exceptions or affidavit, as in other cases when a motion for a new trial is moved for and denied. Such, in our judgment, is the fair construction of the Code of Civil Procedure. We think the other appeals should not be dismissed, except the appeal from the order appointing a receiver, which will be discussed elsewhere in this opinion.

It appears from the bill of exceptions that on the first day of January, 1827, the citizen Francisco Castro presented "to the commander in chief of the Californias" a petition, in which he speaks of himself as a former member of the deputation of the territory of Alta California, and stated that since the fifteenth of April, 1823, he presented to the territorial assembly (deputation) a memorial, a true and faithful copy of which he appended to his memorial, as follows:

"Honorable Deputation: Don Francisco Castro, member of the provincial assembly of Upper California, citizen of and resident in the town of San Jose, in the said province, with due respect, presents himself to you and exposes—

"That, being the owner of large herds of horned cattle and horses, he finds himself under the necessity, in order to preserve the cattle which he now possesses, and in order to provide for the maintenance

of his numerous family, to solicit of you that a piece or tract of land may be given to him for the purpose of fixing his establishment.

"Wherefore, I address myself to your high sense of justice, and ask of you that, in the exercise of the ample powers with which you are invested, you would be pleased to grant to me the possession of three square leagues (*sitios*) in the place called 'Los Cuchigunes,' or 'San Pablo,' formerly occupied by the mission of San Francisco, which lies opposite the said mission and the port of said name, and upon its shores; which piece of land has been abandoned by the said mission, and which, with the previous knowledge of its holy fathers and father ministers, I had already solicited from the present government, who will testify to the fact if necessary.

"Feeling thus confident as I do that you will have the kindness to consider myself entitled to this favor, I request and pray of you to give me the rights of property, possession, and ownership to the land in due form of law, so that it may be secured to me and my successors. Wherefore, I humbly solicit that you will look favorably at my demand, and do that which you will deem pertinent and necessary.

"*Monterey, April 15, 1823.*

"Honorable Deputation.

"FRANCISCO CASTRO."

That on the same day (fifteenth of April, 1823) the honorable assembly made the following decree or order:

"MONTEREY, April 15, 1823.

"The honorable assembly [deputation] grants to the claimant the piece of land which he solicits, measuring three square leagues, considering the said claimant entitled to said favor for his services, his known probity, and the abundance of stock which he possesses, for which purpose the government appoints the commander of the presidio of San Francisco for the measurement and giving him possession of the lands for which he petitions. ARGUELLO.

"JOSE JOAQUIN DE LA TERRE, Secretary."

The above is made part of the petition.

The petition concludes as follows:

"Considering that to the present time the foregoing decree has not been complied with, the reason thereof being unknown to me, I present myself to you in order that, making use of the powers with which you are invested, you will be pleased to give the orders necessary for the purpose of having the foregoing decree enforced. The highly discriminating powers which distinguish you, make me confident that you will grant me this favor, for then only will I consider myself safely and permanently settled, and having nothing to fear either for my live-stock or for the sundry branches of industry, and to the mainte-

nance of my family; this last point being the first which occupies my attention.

"Wherefore, I respectfully pray that, taking my petition into consideration, you will be pleased to order all that which you will deem pertinent and reasonable, which favor will, I hope, be granted to me.

"In the presidio of San Francisco, first of January, 1827.

"FRANCISCO CASTRO."

On the margin of this petition to the commander in chief the following order was made:

"PORT OF SAN DIEGO, Jan. 29, 1827.

"The commander of San Francisco will be pleased to report why the right of possession within referred to was not given.

"ECHEANDIA."

On the twenty-seventh of July, 1827, the above-named Castro presented a petition "to the commander in chief and political chief of the Californias." The petition begins as follows: "Francisco Castro, owner of the rancho San Pablo, in the district of San Francisco, respectfully presents himself to you, and in due form of law and according to his rights exposes:" The petition proceeds to set forth that four years have elapsed since he became and continued in the possession of the said tract of land, as will appear by the document accompanying these presents, which document, granted by the honorable deputation, confirms the donation, and orders that due title to the possession of the land be given to him, (Castro,) and requires the commander of San Francisco to do so; that though the gentleman notified for the purpose of giving him said possession, as he (Castro) was at that time a member of the said deputation, and was then called to Monterey on public service, he could not obey said summons, and as from that day he had not been able to settle this matter, he now had recourse to the well-known justice of his excellency, requesting that he would be pleased to order that due possession of the tract of land be given to him. He asks his excellency to take also into consideration that he has already built upon the land a house, having stone foundations, measuring 40 varas, two other wooden houses, planted a garden with many fruit trees therein, and a vineyard containing upwards of 1,000 stalks of vines, built a mill, and sowed 30 fanegas of wheat, and one-half a fanega of corn and beans each; and that he has 600 head of cattle, and 500 horses, more or less; that the tract of land runs along the bank of the creek, (Estero,) and that of the bay (Mar) of San Francisco, from north to north-west, where it meets the boundary line of Sergeant Luis Peralta: its distance from the mission of San Jose is about 13 leagues, and from that of San Rafael a little over 2; that in order to go to the latter, one has to cross an arm of the sea, in consequence of which a boat

has been built, "so that one's family be not in want of spiritual food." He concludes by asking that his excellency would be pleased to take his demand into consideration and grant it if just. This petition is signed by Castro, and bears date at Monterey. He appends to it his petition to the territorial deputation, and the decree of the same, above given. On this petition the following order was made:

"Let the possession prayed for by the claimant be given to him, it being understood that the three *sitios* prayed for and granted are to measure three square leagues; the said possession being given to him on the place where he has erected his house, or wherever it may be most convenient on the said *sitios*, bearing in mind that the measurement and putting in possession must begin from the place where his house is built, or from any other place pointed out by him, and that there must be measured therefrom 7,500 *varas* in each direction; and to that effect I appoint, as an intelligent and honest man, the citizen Francisco de Haro, a resident of the *presidio* of San Francisco, so that he may, for and in behalf of the citizen Francisco, having previously called to his assistance two witnesses, and also the owners of the adjoining estates, and in their presence he may pass upon and operate in due form of law, and fulfill all the formalities prescribed, and in furtherance of this decree. This done, that these two documents be sent back to me through the commander of the *presidio* of San Francisco, by whose channel I now forward them, in order that they may be complied with, and in order, also, that they may be registered in the book of records and possessions, which are kept in this office. ESTRADA."

It further appears that Castro presented the following petition, dated the thirtieth of January, 1828, to the commander in chief:

"*To the Commander in Chief:* Now comes the citizen Francisco Castro, who says that four years ago he petitioned his excellency, Don Louis Antonio Arguello, for the place called 'San Pablo,' claiming three square leagues out of it, which were granted to me by a decree in which he orders that due possession be given to me, as the person appointed for that purpose, Don Ignacio Martinez, has not as yet to this day done it, on account of you having kept in your hands the document upon which, and in consideration thereof, the usual legal proceedings are to be had which shall confirm the grant and possession of the said piece of land. I now come and pray you to deliver to me the said document in your possession, so that the formalities prescribed may be complied with in furtherance of the request of the commissioners appointed.

"*San Francisco, thirtieth January, 1828.*

"FRANCISCO CASTRO."

It does not appear that any order or decree was made on this petition. On the first of May, 1830, he presented a further memorial addressed to the political chief:

"To the Honorable the Political Chief: Francisco Castro, of the town of San Jose, Guadalupe, residing on the rancho of San Pablo, respectfully comes to you and says that he is the owner of the place called San Pablo; that it was granted to him five years ago by the honorable the territorial deputation; that, taking in consideration the laws concerning the colonies and the supreme decree of your excellency, renews his claim to the possession of the said tract of land, which measures three *sitios*, and is such as described in the first claim presented by him and now in the hands of your excellency, requesting you to remark that although he has frequently requested that possession be given to him of said tract of land, that the same has not as yet been done. He therefore renews his claim that due possession be given to me of the said tract, and that the amount expended and the improvements made by his family on the said land should be taken into united action; the same consisting of a house, measuring 10 *varas* and having good foundations, 1,000 stalks of vine, and sundry other plants.

"And in order that this claim be attended with a full knowledge of the facts, and justice rendered to him in the present instance, he will add that he is fifty-five years of age; that he is married and has ten children; was born in the town of Cinaloa, in the district of Sonora, which was founded by his father; that he was for thirteen years a soldier and corporal in the Mexican company of artillery; and that he has belonging to him, on the tract which he occupies, one thousand four hundred head of cattle, six hundred sheep, and five hundred horses. He would therefore respectfully request that, in consideration of the services rendered by him, the possession of the said tract of land be granted to him, in order that he may, in peace and quietness, and with confidence, go on with the improvements necessary for the maintenance of his numerous family; which favor, from your well-known sense of justice, will, he trusts, be granted to him.

"Rancho of San Pablo, first of May, 1830.

"FRANCISCO CASTRO."

The following marginal decree was made on the foregoing:

"MONTEREY, twenty-sixth May, 1830.

"Let the plaintiff add to his petition a plan (*diseno*) showing the conformation, extent, and all other important particulars relating to the tract of land claimed by him. ECHEANDIA."

No doubt the plan or *diseno* above spoken of related to the requirement of the rules and regulations of 1828, in relation to the granting

of lands for colonization of the territories of the republic of Mexico, and that the law of 1824 and the regulations of 1828 had then been promulgated in California, and that the laws concerning the colonies referred to in the petition were the law and regulations above mentioned.

On the fifth day of November, 1831, Francisco Castro died, having first made his will, which appears in the bill of exceptions. The will opened with the following recital:

"On the twenty-first day of October, 1831, I, Francisco Maria Castro, finding myself, by Divine mercy, of sound mind, but severely sick, and desirous of disposing of my effects before I die in the best possible form, in the absence of a notary public, having called all the witnesses who would willingly come, and asked and supplicated Diego Forbes and Rodriguez to write in the presence of said witnesses the following testament, which I will dictate in the form following."

The will appears to have been very formally drawn up. Among other dispositions the following are made:

"I order, and it is my will, that my wife, Gabriella Berreyessa, shall have absolute title to one-half of all my property, rights, and credits, with all the movables of my house, for her aliment and maintenance in the same manner that she has had during my life; and I charge my children to comply with the direction or obligation in the same manner as though it were with my person."

The following clause is inserted in a subsequent part of the will:

"I order, and it is my will, to leave, as in fact I do leave and give, all my property, rights, and actions, together with all the land of my rancho San Pablo, to my wife one-half, and the remaining half equally between my legitimate sons and daughters, each being owner of his equal part or share of the effects." The language of this clause without the other is sufficient to devise one-half of the ranch to the wife.

The will contains these further clauses, among others:

"I pray and declare that it is my will to nominate, and I nominate and appoint, for my executors of this, my voluntary last testament, the following named persons: In the first place, I appoint my son Joaquin Isidro Castro my first executor, and holder of the property of my wife, my daughters, and sons,—Ramen, Victor, Jesus Maria, and Alvino Antonio,—enjoining them to strict compliance with my ultimate wish, at the same time giving him all right and power to superintend and take care of the rights and effects corresponding to each one of those persons,—that is to say, my wife, my legitimate daughters, and my sons aforementioned; and also to cause the rest of my children to comply with this my last wish.

"I nominate and appoint my son Juan Jose Castro as my second executor, and my son Gabriel Vicente Castro my third executor, to carry out my last wish, and conferring upon them all the rights which the laws direct in these cases.

"I declare and direct all my executors that, if any of my children

attempt to introduce discord or difficulty of any kind, in order to disturb the peace and quiet of my family, he or she be ejected the ranch immediately, without exception or person.

"I declare as my last wish, and direct, that all my tame horses be for the use of my wife, my legitimate daughters, and my sons Ramon, Victor, Jesus Maria, and Alvino Antonio. My horses number thirty, with two mules, which are for the use of my house.

"I direct, * * * and it is my desire, that my youngest son shall be master or owner of my branding-iron and cattle-mark."

This will was signed by Castro on the third day of November, 1831, and was attested by three witnesses, who sign: "Carlos Castro, first witness to this testament; Jose Berreyessa, second witness to this testament; Diego Forbes and Rodriguez, third witness to this testament."

It will be observed that the testator appoints his son Joaquin Isidro Castro first executor of his will.

On the twenty-sixth of May, 1834, this son and first executor of the will presented to the political chief the following petition:

"To his Excellency, the Political Chief: The citizen Joaquin Isidro Castro presents himself before your excellency, and in due form of law exposes:

"That in consequence of the death of my father, who has instituted me the heir of a portion of his property and guardian of that of my brothers, (as will appear by his testament, a copy of which is registered in this capitol,) and in fulfillment of the obligations resulting from the trust which I have accepted, and for the due execution of the same, I solicit of your excellency the lawful ownership of a certain piece or tract of land named San Pablo, a plan of which is hereto annexed, together with a copy of the first petition for the said tract, presented by my father and dated the fifteenth of April, 1823, and also of a copy of gubernatorial decree of the same date; and, the same having remained without effect, I hereby renew a demand for the said piece of land, together with the documents necessary for the security of the rural property therein situated, consisting of three thousand head of cattle, nine hundred horses, and six hundred sheep. I hereby solicit your excellency to do that which you will deem just and necessary in the premises, protesting my entire good faith, and taking the oath prescribed, etc.

"Rancho de San Pablo, May 26, 1834.

"JOAQUIN ISIDRO CASTRO."

On this petition the following marginal decree was made by Jose Figueroa, the political chief to whom it was addressed:

"MONTEREY, June 1, 1834.

"Let the petitioner be notified to produce the original documents, in virtue of which the lands which he claims were granted, and a re-

port be made of the same. I, Don Jose Figueroa, a general of brigade of the Mexican republic, commander general, inspector, and political chief of the territory of Upper California, so order and decree, and, in faith thereof, thereunto affix my name.

“JOSE FIGUEROA.

“AUGUSTIN V. ZAMORANO, Secretary.”

To this decree Joaquin I. Castro made answer on the eleventh of June, 1834. The answer is as follows:

“This day, the eleventh of June, one thousand eight hundred and thirty-four, the petitioner, Don Isidro Castro, being present, and the foregoing notification from the political chief having been duly served on him, and having been made acquainted with it and heard it read to him, declared and answered that the original documents referred to in said notification are on file in the office of the secretary of the government, together with a petition of his deceased father, praying for a grant of said rancho; and, having so answered in good faith thereof, he affixed thereto his signature, and so did also the secretary of the government.

JOAQUIN ISIDRO CASTRO.

“AUGUSTIN V. ZAMORANO.”

On the same day Gov. Figueroa ordered that the secretary of the government report on this answer, annexing the documents referred to, and of the whole let an account be rendered in order to determine thereupon.

The secretary, Zamorano, in conformity with the foregoing order, produced the documents referred to, for such further orders as his excellency might be pleased to make.

The documents referred to are those above given, consisting of the various petitions made by Francisco Castro in his life-time, and the orders and decrees made thereon.

On the petition of Joaquin, above given, Gov. Figueroa made this decree:

“MONTEREY, June 12, 1834.

“Taking into consideration the petition at the head of this *expediente*, the commission granted by the honorable, the territorial deputation, on the fifteenth of April, 1823, and all steps taken and other things done in conformity with the requirements of the law on such matters,

“We declare Don Francisco Maria Castro the lawful owner, and by his death his successors, of all that tract of land known under the name of ‘Los Cuchigunes,’ or ‘San Pablo,’ bounded by the ranchos of ‘San Antonio,’ and ‘El Pinole,’ and by a portion of the port of San Francisco. Let therefore a title be delivered in conformity with the above; have it registered in the proper book, and handed over to the testamentary executor, Don Joaquin Isidro Castro, for the ends required, and have the *expediente* recorded.

"I, Jose Figueroa, general of brigade, commander in chief, general inspector, and superior political chief of the territory of Upper California, do so order and decree, and in faith hereunto sign my name.

"JOSE FIGUEROA.

"AUG. V. ZAMORANO."

On the same day the following grant was made:

"Whereas, the late Francisco Maria Castro petitioned the deputation on the fifteenth of April, 1823, a reversion in the tract of land known under the name of Los Cuchigunes, or San Pablo, bounded by the ranchos of San Antonio and El Pinole, and by a portion of the bay of San Francisco; and, whereas, his successors did subsequently apply for the lawful ownership of the said tract of land, having previously taken all the steps required with the formalities prescribed by the laws and regulations in such cases made and provided; now, therefore, using the powers with which I am intrusted, and in the name of the Mexican nation, by decree of this day, I do grant to the said successors the above mentioned tract of land, declaring the same to be their property by the present letters, in entire conformity with the tenor of the laws and in confirmation of that concession, subject to the following conditions:

"*First.* That they will comply with the rules and regulations which may hereafter be made for the distribution of public lands, and that they will not, in the meantime, neither they, their grantees nor their heirs, have the power of dividing or alienating that which is granted to them; neither will they have the power of laying upon the same any liens, mortgages or incumbrances whatever, even for pious causes, nor to make a mortmain transfer of the same.

"*Second.* They are hereby allowed to fence the same, without prejudice to the passages and ways across the same and other servitudes. They will have the free and exclusive use and enjoyment of the same, cultivating and using the said land as they will think best; but within one year, at the latest, they must build a house thereon, which shall be inhabited.

"*Third.* They shall apply to the competent judge for the judicial possession of the said land, in accordance with the present title, for the purpose of having the boundaries of the same marked out, which, besides the ordinary land-marks, will be defined by some fruit trees or other trees of some utility planted for the purpose.

"*Fourth.* The herein-mentioned tract is of three square leagues, more or less, according to the design which accompanies the *expediente* granted to them. The judge who will put them in possession shall have the said tract measured according to law, so that the boundaries may be marked out, the surplus, if any, reverting to the nation, for such uses as may be proper.

"*Fifth.* Should they fail to comply with the foregoing conditions

the grantees will lose their rights to the said tract of land, which will become liable to be claimed by others.

"I therefore order that these presents be, to all intents and purposes, a good and valid title to the grantees; that the same be recorded in the proper book, and that it be delivered to the parties interested for their security and for all other ends and purposes.

"Given at Monterey, this twelfth day of June, 1834.

"JOSE FIGUEROA.

"A. V. Z., Secretary."

On the twenty-third of June, 1835, Joaquin L. Castro presented a petition for an augmentation of the San Pablo ranch to the political chief, as follows:

"MONTEREY, June 23, 1835.

"Joaquin Castro, a citizen residing within the jurisdiction of the port of San Francisco, presents himself to you, and with due respect says:

"That I have already solicited from your excellency the legitimate possession of the rancho of San Pablo, which we, the heirs of my deceased father, actually occupied, as I have already stated in my first petition, but through inadvertence have neglected to ask for the extent of land included in the plan annexed thereto, and have said that we only claimed the three square leagues that we formerly occupied.

"This piece of land being rather too small for the number of cattle grazing on the same, which number we are exerting ourselves to increase, I solicit of you, in the name of the other heirs, and as their attorney in fact, that said petition be understood to exclude for" [from?] "the three leagues which we occupied, the augmentation of the land described in the aforesaid plan.

"Wherefore, I pray your excellency to grant that which I demand, hereby protesting of my gratitude, and taking the necessary oath.

"Monterey, June 23, 1835.

"JOAQUIN ISIDRO CASTRO."

The governor made the following marginal order on this paper:

"MONTEREY, June 26, 1835.

"Let this petition be added to the *expediente* upon the matter, so that the secretary may report upon the same whatever he may deem expedient for the proper conclusion thereof. FIGUEROA."

This order was obeyed by the secretary, Negrete, on the same day. The secretary made a further report on the twenty-seventh of June, which it is unnecessary to insert here.

On the fourteenth of August, 1835, Figueroa made an order that a grant issue of the whole tract, in the following words:

"MONTEREY, August 14, 1835.

"Considering the petition at the beginning of this *expediente* which was obtained on the fifteenth of April, 1823, from the most excellent territorial deputation, the subsequent petition, which was made on the twenty-third of June of the present year, praying for the amplification of a little more than a square league according to the plat marked No. 2, and also such other additional documents as were furnished in conformity of the law and regulations in such cases made and provided, I hereby decree Don Francisco Maria Castro, and by his demise his heirs and successors, the lawful owner and owners of the tract of land known under the name of 'Los Cochigunes' or 'San Pablo,' bounded by the ranchos of San Antonio and El Pinole, and by a portion of the port of San Francisco. I order that a good and sufficient title be made out; that the same be registered in the proper record book; that it be delivered to the testamentary executor and heir, Joaquin Isidro Castro, for all necessary ends and purposes, and that the *expediente* thereof be archived.

"I, Don Jose Figueroa, general of brigade of the Mexican republic, commander general, inspector, and political chief of the territory of Upper California, so order and decree, and in faith thereof hereunto affix my name.

JOSE FIGUEROA.

"F'co DEL CASTILLO NEGRETE, Secretary."

On the twentieth of August, 1835, a grant issued in the usual form of the whole property, including the augmentation, to the *successors* of Francisco Maria Castro. On the twenty-second of May, 1840, the *expediente* was presented to the departmental assembly, and the same was approved by the assembly on the thirtieth day of May, 1840.

We have thus presented the matters appearing in the *expediente* very fully, in order that the history of the title in its inception and consummation might appear herein. Mexico achieved her independence, after a long struggle, in 1821, and became then a republic. The plan of Iguala adopted by the revolutionary government of Mexico on the twenty-fourth of February, 1821, and the treaty of Cordova of the twenty-fourth of August, 1821, between the then government of Mexico and the Spanish viceroy, mark the close of the struggle by Mexico for her existence as an independent nation. By the treaty of Cordova, the independence of the country was established. *U.S. v. Ritchie*, 17 How. (U. S.) 538. Sometime in 1822 the authorities of California recognized and gave in their adhesion to the new order of things established in Mexico. The first step taken by Francisco Castro for the acquisition of title to the rancho San Pablo was by a petition to the territorial deputation on the fifteenth of April, 1823. This petition was for a grant "of the possession" of three square leagues in the place called "Los Cochigunes," or San Pablo. The grant was made by the deputation and approved by the then governor, Arguello. That Arguello

was then governor of California, see the list of colonial governors in Dwinelle's Colonial History, *Addenda*, 115.

It is contended that the territorial deputation never had power to grant land, and several authorities are cited to that effect. *U. S. v. Workman*, 1 Wall. 762; *Beard v. Federy*, 3 Wall. 491; *Christy v. Pridgeon*, 4 Wall. 203; *Hornsby v. U. S.* 10 Wall. 231-238; *U. S. v. Vigil*, 13 Wall. 450-451; *Ferris v. Coover*, 10 Cal. 589. But in the view we take of this case it is unnecessary to decide this question. The question we especially refer to is whether the deputation, with the approval of the governor, had the power to grant lands prior to the enactment and promulgation of the decree of the Mexican congress of the eighteenth of August, 1824, relating to colonization, and of the rules and regulations of the twenty-first of November, 1828, for the colonization of the territories of the republic of Mexico. See *Ferris v. Coover*, 10 Cal. 634-637; *Rockw. Span. Mex. Law*, 451, 453; 1 White, *New Recopilacion*, 601, for this decree, and the rules and regulations.

It may be further conceded that Francisco Castro never complied with the decree and regulations aforesaid, and never acquired any title to the San Pablo rancho previous to his death. That the facts appearing in the *expediente* above set forth gave him a strong equity to such a grant we have no doubt; but it is conceded, as contended by appellants, that prior to his death he acquired no title. It may be remarked here that Gov. Figueroa, reputed by all to have been an able and learned man, well acquainted with the laws of Mexico, in his order of the twelfth of June, 1834, above inserted, declares in so many words that Don Francisco Maria Castro is the lawful owner of the tract of San Pablo petitioned for. We consider this statement of Figueroa as high authority sustaining the position that Castro was in his life-time the owner of the tract above mentioned; but, as we have said above, in the view we take of the case, it is unnecessary to pass on it. Prior to his demise, in November, 1831, he made and executed a will, the clauses of which, so far as pertinent, have been stated above. We have seen that he demised one-half of this rancho to his wife, and made his son his first executor.

In this condition of things his son Joaquin, the first executor, presents to the then governor (Figueroa) on the twenty-sixth of May, 1834, a petition for the rancho. In this petition he states "that in consequence of the death of his father, who has instituted him heir of a portion of his property and guardian of that of his brothers, as will appear by his testament, a copy of which is registered in this capitol," and *in fulfillment of the obligations* resulting from the trust which he has accepted, he solicits of his excellency the lawful ownership of a tract of land called San Pablo, a plan of which was annexed, with a copy of the first petition for the said tract presented by his father, dated the fifteenth of April, 1823, and also a copy of the gubernatorial decree of the same date. He further states that the petition

and decree having remained without effect, he thereby renews a demand for this piece of land, with the documents necessary for the security of the rural property thereon situated, consisting of 3,000 head of cattle, 900 horses, and 600 sheep. The documents referred to in this petition were produced before the governor and appear in the *expediente*, (they are set forth above,) and Gov. Figueroa having taken into consideration the petition, and the papers presented on the twelfth of June, 1834, orders a grant to be issued for the land, and on the same day a grant was issued. The order or decree that a grant issue declares "Don Francisco Maria Castro the lawful owner, and by his death his successors," of the tract of land known under the name of San Pablo, and directs that the title be delivered in conformity thereto, ("with the above,") have it registered in the proper book, and handed over to the testamentary executor and *heredero*, (heir,) Don Joaquin Isidro Castro, for the ends required."

The word translated "testamentary executor" in the above is "*albacea*," and it is said to be incorrectly rendered. Escriche defines "*albacea*" thus: "He who is charged with fulfilling and executing that which is directed by the testator in his testament or other last disposition." See word "*Albacea*" in Escriche's *Diccionario*, etc. In the dictionary of the Spanish academy it is defined "*testamenti exsequendi curator*." In Seoane's, Newman & Barretti's Dictionary the definition is "testamentary executor." We think the word is correctly translated.

The title or grant was accordingly issued to the *successors* of Don Francisco Maria Castro. The word translated "successors" in the above document is "*herederos*." The important question arises here, and it is to be determined, who are the *herederos* referred to by Gov. Figueroa in the described grant above stated, and to what persons or class of persons did he intend to make the grant or title? The grant is made to these persons, whoever they are. It is contended on behalf of the appellants that the *herederos* referred to are the brothers and sisters. On the other hand, the contention is that the *herederos* referred to are the persons to whom the rancho was devised by the will of Francisco Maria Castro. Of this word "*heredero*," Escriche says that "anciently the proprietor of any inheritance was so called; and it still preserves this signification in some parts." He proceeds further to state that this signification comes to us from the Roman law; that Justinian, in his Institutes, informs us that the expression *acto de heredero* is the same as the act of the proprietor, giving as a reason that the ancients called heirs, owners, or masters, *veteres enim heredes pro dominis appellabant*. Upon which text Cuyas observes that *heres* comes from *herus*—lord or owner. Further as to this word, he says he is the person who, by a testamentary disposition or by law, succeeds to the rights which a deceased person held at the time of his death; that the word "*heredero*" is, according to some, derived from the latin *herus*, signifying lord or owner; according to others, from the

word "*hæres*," which signifies joined or fastened to another, because the heir (*heredero*) is next to the person from whom he inherits, as his relation or intimate friend. Thus it is, in Latin, some write *heres* and others *hæres*; that the heir represents the person of the deceased, and they are considered as the same person; that the quality of heir has no other origin than the will of man or the disposition of the law; and hence comes the general division of heirs into *testamentary* or *intestated*, and *heirs by law* or *from intestacy*. The testamentary heirs are divided into *forced* or *necessary* and *voluntary* or *strangers*. The heirs by the law or from intestacy can be subdivided into heirs by *relationship*, heirs by *matrimony*, or *anomalous*. See word "*Heredero*," Escriche's Dic. *supra*. The heir can be instituted by the will if designated in the will by apt words, so that it can be perceived who is meant. See 2 Moreau & Carleton's Partidas, Law 6, on pages 983, 984; Schmidt's Law of Spain and Mexico, arts. 1048-1051. And several persons may be instituted *joint heirs*. See work last cited, art. 1050. The language of the will of Francisco Maria Castro was sufficient in a legal and valid will to institute an heir.

The question then recurs, to whom did Gov. Figueroa grant the rancho San Pablo? In our judgment the governor intended to make the grant to them to whom the property was given by the will of Francisco M. Castro, and in the proportions in which it was so given. The language of the documents signed by him indicate this clearly. To show that such was his intent, we will review the papers briefly. The petition of the testamentary executor, as Joaquin I. Castro is styled in the decree of the twelfth of June, 1834, bearing date twenty-sixth of May, 1834, refers to the last will of his father, by which he was instituted heir, and states that a copy of it is registered in the capitol. He states that he desires the grant that he may fulfill the obligations resulting from the trust which he has accepted, and for the due execution of the same. He refers to the application of his father and the decree upon it, and in accordance with the order of the governor produces the documents relating to the application made by his father prior to his death. It is a fair construction of this petition that it referred to the obligations resulting from the provisions of the will, by which one-half of the rancho was devised to his mother, and of which will he was the executor. He desires the grant for the due execution of the trusts,—referring to the trusts under the will. But whether this be the proper construction of the petition of Joaquin or not, it is evident that the governor put this construction upon it. He declares that the father was the lawful owner, and by his death his successors (*herederos*) are lawful owners of the land, and directs that a title in conformity with this view be delivered and handed over to the *testamentary executor*, Don Joaquin Isidro Castro, for the ends required. The grant is then issued in conformity with this decree to the successors, (*herederos*.) No doubt the governor examined and considered the will, which was registered in Monterey, the capital, where

he was when he made the grant to the *herederos* who were to succeed under the will. These persons were the successors referred to by the governor in his decree, and grant or title. The title or grant was directed to be delivered to the testamentary executor "for the ends required," that he might execute and fulfill the trusts of the will, and carry out its directions. The governor seemed to have recognized the will as a valid instrument. At any rate, he made the grant to the parties entitled under the will and according to its provisions, which he had power to do under the decree of 1824 and the regulations of 1828.

The same reasoning applies to and is true of the augmentation petitioned for by Joaquin I. Castro on the twenty-third of June, 1835, and granted on the twentieth of August of the same year.

It appears from the bill of exceptions that after the death of Gabriella Berreyessa, widow of Francisco Maria Castro, which occurred in December, 1851, the claim for the rancho San Pablo was presented to the board of land commissioners to ascertain and settle private land claims in the state of California under the act of congress of March 3, 1851. When the claim was presented to the board, a petition was presented along with it, signed by Eugene Musson and Saunders, Hepburn & Bagley, for the petitioner. The petitioner was Joaquin I. Castro, who styles himself in it, "administrator with the will annexed of the estate of Francisco Maria Castro, deceased." The petition was filed October 9, 1852, and is in the following words:

"RANCHO OF SAN PABLO, CONTRA COSTA COUNTY.

"To the United States Land Commissioners to ascertain and settle the private land claims in the State of California: Joaquin Isidro Castro, administrator with the will annexed of the estate of Francisco Maria Castro, deceased, respectfully represents:

"That on or about the fifteenth of April, 1823, said Francisco petitioned the governor of California—at that time Don Luis Arguello—for a tract of land situated in said territory of California, containing three square leagues, and within the boundaries following, viz.: Situate on the coast of the mission of San Jose, parallel with the port of San Francisco, adjoining the property of the Sergeant Luis Peralta, up to the line of the ridge of mountains to the place called 'Los Cochigunes,' at the margin of a deep creek that there springs, at something like five hundred *varas*. The house is built distant three leagues from the place of residence of Peralta, known as the hill of San Antonio, and up to the ravine of El Pinole at the north.

"That afterwards, on or about the day and year aforesaid, said Francisco received from the said governor and territorial deputation of said territory a grant of said land, and shortly thereafter went into possession thereof, and occupied and improved the same continuously thereafter until his death, in the year A. D. 1831.

"That afterwards, on or about the twelfth day of June, 1834, upon

the petitions of said Francisco before his death, and afterwards of this petitioner, for himself and others, the claimants under said title, Don Jose Figueroa, governor at that time of said territory, by order of that date, recognizing the grant and title aforesaid, ordered a formal title to said land to be made out for the benefit of said Francisco and his successors in interest, and to be delivered to petitioner as the testamentary executor of said Francisco, which said formal title was made out and delivered as aforesaid, on the day and year last aforesaid.

"That afterwards, to-wit, on the fourteenth and twentieth of August, 1835, said Figueroa, governor as aforesaid, upon petition made according to law, granted as aforesaid all the surplus land of San Pablo, according to a plan thereof annexed to the petitions last aforesaid, copies and translations of all which said documents, petitions, titles, grants, and plats, hereinbefore referred to, are herewith filed.

"That said grants were afterwards confirmed by the department assembly of California.

"That said Francisco and his successors in interest have duly complied with the terms and conditions of said grants, and of the laws and regulations of Mexico relative thereto.

"Petitioner further represents that said Francisco was married to Gabriela Berreyessa, and died in the year 1831, leaving surviving him his wife and eleven children; the issue of said marriage being Alvina, Maria de Jesus, Maria, Francisca, Martina, Antonio, Juan Jose, Gabriel, Victor, Jesus Maria, and this petitioner.

"That said Francisco left a will signed, attested, and published according to law, whereby he devised and bequeathed to his wife one undivided half of his said land and other property, the other half to his said children, to be equally divided between them. That said Martina Castro has intermarried with Juan B. Alvarado; that said Francisca married Joaquin Moraga, both of whom died, leaving issue of said marriage five children, viz., Francisco, M. Jose, Maria de los Angeles, Louisa M. de Briones, and Guadalupe, who married Vicente Martinez and died leaving surviving her two children (issue of said marriage, now living, viz., Francisca and Merced. That since the death of Francisco first aforesaid, his said children, Alvino, Maria de Jesus, and Maria, have died without issue, and their share of said land descended to their said mother, who thereupon became the absolute owner of fourteen twenty-seconds (14-22) of all said land.

"That afterwards, on the fourth day of August, 1851, said Gabriela Berreyessa de Castro, by deed executed the day and year aforesaid, in consideration of natural love and affection for her said daughter, Martina Castro de Alvarado, gave and conveyed to said Martina all the said interest (14-22) of her, the said Gabriela, to and in said land.

"That said Martina thereupon became entitled to fifteen twenty-seconds (15-22) of all the land aforesaid.

"Petitioner represents that he was named executor in the said last will of said Francisco, but that he declined to act as such, and afterwards, on the — day of —, 1852, he qualified, in the probate court of the county wherein said land is situated, as administrator with the will annexed, and that the period of administration is not yet expired. Wherefore, petitioner prays that said land may be confirmed as granted to the parties entitled thereto as aforesaid.

"EUGENE MUSSON, SAUNDERS, HEPBURN, and BAGLEY,
For Petitioner.

"[Indorsed:] Filed October 9, 1852.

"GEO. FISHER, Secretary."

A translation of the will and codicil of Francisco Maria Castro was presented along with it.

It will be observed that in this petition it is stated that a grant to Francisco Maria was made of a tract of land of three leagues, on his petition, by the governor, Don Luis Arguello, and the territorial deputation, on or about the fifteenth of April, 1823, and that shortly thereafter the grantee went into possession of the land granted, and occupied and improved the same until his death, in 1831. The petitions for said grants by Figueroa are also stated, which grants were confirmed by the departmental assembly. It is further stated that Francisco Maria was married to Gabriela Berreyessa, and died in 1831, leaving surviving him his wife and 11 children, the issue of this marriage, viz.: Alvino, Maria de Jesus, Maria, Francisca, Martina, Antonio, Juan Jose, Gabriel, Victor, Jesus Maria, and the petitioner; that Francisco Maria left a will, signed, attested, and published according to law, whereby he devised to his wife one undivided half of his said land and other property, and the other half of his said property to his children, to be equally divided between them; that said Martina Castro has intermarried with Juan B. Alvarado; that said Francisca married Joaquin Morago, both of whom died, leaving issue of said marriage five children, (naming them;) that one of these children last named, Gaudalupe, married Vicente Martinez, and died, leaving surviving her two children, issue of said marriage, living when the petition was filed, named Francisco and Merced; that since the death of Francisco Maria Castro, his said children, Alvino, Maria de Jesus, and Maria, have died without issue, and their share of said land descended to their mother, Gabriela, who thereupon became the absolute owner of fourteen twenty-seconds of all said land; that on the fourth day of August, 1851, said Gabriela Berreyessa, by deed executed on that day, gave and conveyed to her said daughter, Martina Castro de Alvarado, all her interest in said land; that said Martina thereupon became entitled to fifteen twenty-seconds of all the land aforesaid; that he was named executor in the said last will of Francisco Maria, but declined to act as such, and afterwards quali-

fied as administrator, and that the period of administration had not yet expired. The petition prays for a confirmation of said land "as granted to the parties entitled thereto as aforesaid."

On the seventeenth of April, 1855, the claim of petitioner was confirmed and adjudged to be valid. It also appears that such further proceedings were had that the claim was finally confirmed by the proper United States district court; that the land was afterwards surveyed, and the final survey was approved on the seventeenth of August, 1864, by Hon. OGDEN HOFFMAN, United States district judge. The final survey contained 17,938 58-100 acres, a patent for which was afterwards, on the thirty-first of January, 1873, executed and issued by the United States to Joaquin Y. Castro, and his heirs and assigns, with the stipulation that neither the confirmation nor patent shall affect the interests of third parties. In relation to this patent it may be here said that it was issued after the suit was commenced, and was offered in evidence by the plaintiff after the argument of the cause had commenced. To its admission in evidence, Mr. Brooks, on behalf of the defendants for whom he appeared, objected, "because the said patent issued after the commencement of this suit, and it was not alleged in any supplemental complaint or otherwise." The court overruled the objection, and an exception was reserved on behalf of the defendants who objected. We cannot see that any injury was done by this ruling to any party, and therefore, admitting that it was an error, we would not reverse for such error. It is well settled that error without injury furnishes no ground for reversal.

It is argued that the will of Francisco Maria is invalid, as it was not executed according to the law as it stood when it was made. In the view we have taken above, that the grants by Figueroa were made to those who are described in the will as the devisees or heirs of the land, and in the proportion as devised by the will, it is unnecessary to pass on the validity of the will. We will say, however, that this will was before the supreme court of this state in 1856, in a case decided at the April term of that year, in which this point was passed on. *Castro v. Castro*, 6 Cal. 158. It was held in that case that the will was properly executed; that a sufficient number of witnesses attested it; and that it was in other respects executed according to the law in force when it was made and published. The ruling in this case was approved in *Tevis v. Pitcher*, 10 Cal. 477. There was proof in this case of the custom by which a will attested by three witnesses was well attested, as in *Tevis v. Pitcher* and in *Castro v. Castro*. See, also, *Panaud v. Jones*, 1 Cal. 488; *Adams v. Norris*, 23 How. (U. S.) 363. Admitting, as argued, that the probate court had no jurisdiction of the probate of will in *Castro v. Castro*, and that, therefore, the decision in the case in 6 Cal. is not binding for want of jurisdiction, still we are of opinion that the law was properly declared in the case, and that the rule therein laid down was approved in *Tevis v. Pitcher*. Therefore, we do not think it necessary to review the rul-

ing in *Castro v. Castro*, considering this point as settled by the judgments of this court. If we were to decide this point we would feel bound to hold the will of Castro to be a valid will, properly executed and attested.

It is further contended that though the will was executed according to law, still that it cannot be held to have the effect to pass to Gabriela Berreyessa, the widow, one-half of the San Pablo ranch, for the reason that the testator had not, under the Mexican law, the power to make such devise. This point is elaborated with much learning and ability by the learned counsel (B. S. Brooks, Esq.) for the defendants, and there is placed before us an extended discussion of the power of the father over his real property, and the limitations and restrictions thereupon. We have read the brief of counsel with great interest and care; but, as stated above, we are of opinion that the devisees under the will were the grantees of Figueroa in both of the grants or titles made and issued by his order, and therefore it is unnecessary to enter upon an examination of the power of Francisco Maria Castro to devise his realty to persons other than his children.

Subsequent to the death of their father, Francisco Maria Castro, and before the death of their mother, Gabriela Berreyessa, three of the children of this marriage, viz., Alvino, Maria de Jesus, and Maria Gregoria, died intestate, and without leaving any descendants. The latter, Maria Gregoria, married Jose Ramon Estrada, who died before his wife. The question arises to whom these interests in the ranch passed. It is contended on behalf of some of the defendants that these interests passed by law to their surviving brothers and sisters, and on behalf of the plaintiff that these interests passed to their surviving mother, Gabriela. On an examination of the Mexican law on the subject, we are of opinion that these interests were vested in the mother. Escriche, in treating of the successions to the estate of intestates, states, as the first class, his or her legitimate descendants. See Escriche's *Dicc. de Legislacion y Jurisprudencia*. Paris edition of 1852, under the title "Hereditario Legitimo o ab intestato." See, also, Madrid edition for 1873, under same title, and Don Juan Sala's "Illustracion del Derecho Real." Lib. 2, tit. 8, § 2; Schmidt's Law of Spain and Mexico, arts. 1232-1234.

The second class or order of succession is stated by Escriche to be the ascendants, the nearest ascendant always excluding the more remote. The law is thus given by this learned author and jurist: "There being no descendants to inherit, as set forth in the explanation of the first order of succession, there enter upon the succession of the deceased intestate his legitimate ascendants, without distinction of sex, with the absolute exclusion of collaterals, though they are brothers. Citing Law 2, tit. 2, lib. 4, del Fuero Juzgo; Law 1, tit. 6, lib. 5, del Fuero Juzgo; Law 4, tit. 13, pt. 6; and Laws 6 and 7 de Toro, 1 and 2, tit. 20, lib. 10, Nov. Rec. Further, that the nearest ascendant excludes always the more remote, because

among ascendants there is no succession by representation, as among decendants, but by proximity of relationship. So that, if the deceased leaves father and mother, both inherit in equal proportions; but if there is father only, or mother only, the survivor inherits the whole property, and the grandfather of the deceased takes nothing. In the same manner, if there is no father or mother, and there is a grandfather of one, and a great-grandfather of the other, the whole inheritance will be that of the grandfather's, to the absolute exclusion of the great-grandfather." Citing Law 4, tit. 13, pt. 6. See Escriche's Dic. de Levy y Jurisp. *supra*; Sala's Ilustracion del Derecho Real, lib. 11, tit. 8, § 6. See Schmidt's Law of Spain and Mexico, §§ 1235-1237. See Escriche's Dic. tit. "*Representacion*."

It is contended further that these interests passed to the other children of Francisco Maria and his wife, Gabriela, by the right of *acrecencia* or *acrecimiento*—accretion. This right is thus defined by Escriche: The right of accretion is the right to unite or aggregate with his portion the portion of him who refuses it, and cannot acquire it, or the right which the co-heirs or co-legatees have over those portions which remain vacant by reason of renunciation or by reason that some of them have not the capacity to take. The right of accretion takes place among the legitimate heirs,—that is, among the heirs called to the succession by the law by reason of relationship in the collateral as in the direct line; so that the portion which remains vacant is added to the mass of the inherited property and is divided with it; and, further, it is understood that there is a failure of one of the co-heirs or co-legatees if he is not living at the time that the will is made, if he rejects the inheritance or legacy, if he dies before the testator, if he omits to comply with the condition, or becomes incapable in any other way. In case he survived the testator a single moment, he transmits his part of the inheritance or legacy to his heirs, when acceptance is not necessary for its transmission, according to what is said in the articles "*Acceptacion de harenencia y de legado*;" and, by consequence, there is then no accretion to the other co-heirs or co-legatees. In this case, the mother, as we have seen, was the heir, and took the estate.

We see nothing in the contention put forth on behalf of some of the defendants that the interests of the above-mentioned children constitute *bienes reservables* in which the widowed mother only had a life estate. The law on this subject only applied where the widow married a second time. See Escriche's Dic. de Ley y Jurisp. art. "*Bienes Reservables o Reservatitions*." It does not appear that Dona Gabriela ever married a second time. According to the above authorities, and there are none of greater weight, it is clear that Dona Gabriela Berreyessa, the surviving mother, inherited the interests of the above-mentioned children, who died without issue and intestate. Some question is made as to the quantity of estate which passed to the widow under the provisions of the will, which we have held was

granted to her by Gov. Figueroa. The provisions of the will have already been quoted, and we are of opinion that it passed the fee. That was the intention of the testator, as appears clearly from the language of the will. See 2 Moreau & Carleton's Partidas, law, 6 tit. 3, pt. 6, p. 983. We speak of the will in these terms as a valid will, because, in our judgment, Gov. Figueroa so regarded it in making the grants to the heirs instituted by that document. As 11 children survived Francisco Maria Castro, to whom were granted one-half the estate in equal portions, and to the mother the other half, Gabriela Berreyessa, the mother, became entitled to eleven twenty-seconds of the rancho San Pablo under the grant, and as she inherited three shares or three twenty-seconds from her children above named, she thus became the owner of fourteen twenty-seconds.

On or about the fourth day of August, 1851, Gabriela Berreyessa de Castro executed to her daughter, Martina Castro de Alvarado, a deed of gift, by which, in consideration of love and affection, she conveyed to her and her heirs forever all her undivided interest in the rancho San Pablo. This deed was recorded in the office of the county recorder of Contra Costa county on the ninth of September, 1851. This conveyance is assailed as null and void because of the mental incapacity of the grantor. The court below found that the grantor, Gabriela Berreyessa, was, on the fourth and twelfth of August, 1851, (at one or the other of those dates the evidence shows that this deed was executed,) and from thence to the time of her death, of sound mind, capable of transacting business, and under no mental disability whatsoever, and that the deed was a valid instrument. It is now contended that this finding is not sustained by the evidence. It is sufficient to say that, as to the capacity of the grantor to make such a deed, the evidence was conflicting, and under the rule of this court, settled by a great number of cases, we are not at liberty to disturb the finding of the court *a quo*, that she was competent to execute said instrument. Under this deed, Martina Castro de Alvarado became the owner of fourteen twenty-seconds of the rancho San Pablo, and, already owning one twenty-second, she then was the owner of an undivided interest of fifteen twenty-seconds of the land to be divided, which she held in common with the owners of the other interests in the land, amounting to seven twenty-seconds.

In 1856 steps were taken to partition the ranch between the various parties claiming interests therein. The agreement for or deed of partition appears in the bill of exceptions. It is a long instrument, formally drawn up, between parties of nine parts. The parties of the first part are John H. Saunders, H. P. Hepburn, and Eugene Musson. The parties of the other parts agree to pay to the parties of the first part the sum of \$2,000, costs of litigation, assessed to them by the agreement in the case of *Castro v. Castro*, as a condition precedent to the operation of the agreement as a conveyance, as set forth therein. By it, three commissioners were named and appointed,

viz., James Alexander Forbes, John B. R. Cooper, and Nicholas Gray, to make partition of the ranch in the manner mentioned in it, and to that end to make the necessary survey, map, and report, which were to be filed for record among the land records of the county of Contra Costa, "with this deed of partition and release, the whole to take effect when so filed and recorded, and not before." Other provisions were made in this instrument of partition, as follows:

By the third article it was provided that the commissioners above named should first separate from the rancho a tract of 50 acres, said 50 acres to be chosen by Dona Martina Castro de Alvarado, so as to include therein the house where she and her husband then lived, and the orchard attached thereto; and all their title and interest in this 50 acres, the parties of the first, third, fourth, fifth, sixth, seventh, eighth, and ninth parts, and Goodale and Benson, also parties of the second part, thereby convey and release to said Martina and her heirs, the same to take effect as soon as the said report and map and this deed shall be filed for record as above stated.

By the fourth article of this deed the commissioners were then to separate from the remainder of the ranch a tenth thereof in value, which tenth they should divide into three equal parts, one of which parts they should assign to Eugene Musson, one to John H. Saunders, and the remaining one to H. P. Hepburn; all their interest and title in which three parts the parties of the other parts thereby convey and release to the said Musson, Saunders, and Hepburn, respectively, and their heirs forever; the same to take effect at the same time as is provided with regard to the 50-acre tract. In consideration whereof, Musson, Saunders, and Hepburn convey and release to all the other parties, and their heirs, all their right, title, and interest in the rest of the ranch, and particularly Musson releases to the said Martina and her husband, and to Joaquin Y. Castro, all his right and claim against them, or either of them, by reason of contracts touching the ranch, heretofore entered into by them with him.

It is provided by the sixth article that the commissioners shall then separate from said ranch an eighth thereof in value, of which 2,000 acres are to be taken from that part of the ranch lying north of the Arroyo Grande, the particular boundaries of which are given. This tract is to be chosen by Dona Martina Castro de Alvarado, provided her choice shall not exceed one-eighth in value of the remainder of the ranch; and the tenth of Saunders, Hepburn, and Musson shall be so allotted as not to interfere with this allotment of 2,000 acres. All their interest in this last allotment the other parties release and convey to the said Martina and her husband, the same to take effect at the same time as the other allotments above mentioned. In consideration of the foregoing, Martina and her husband release and convey to the other parties, except Goodale and Benson, all their title in the remainder of the ranch, except the 50 acres above mentioned, to be held as hereinafter specified; and in further considera-

tion of the foregoing, Goodale and Benson, who are parties of the second part, and mortgage creditors of Martina and her husband, who are also parties of the second part, release in favor of the parties of the other parts the lien of their mortgage against the said Martina and her husband from such parts of the ranch as shall be adjudicated to the other parties; and in consideration of this release it is agreed between Goodale and Benson, and Martina and her husband, that the lien of the mortgage shall attach to and bind the eighth so as aforesaid adjudicated to Martina.

The commissioners were then to divide the remainder of the rancho into seven equal parts in value,—one part to be allotted to each of the parties of the third, fourth, fifth, sixth, seventh, eighth, and ninth parts. The parties of the several parts then convey and release to each other, respectively, the parts so allotted to each party; the same to take effect on the part so released, subject to the same rights, liens, and priorities between themselves as existed on the undivided interests of the said parties of the several parts, at the same time with the others above mentioned. In consideration of the foregoing, the parties of the third, fourth, fifth, sixth, seventh, eighth, and ninth parts, respectively, release and convey to the parties hereto, except Goodale and Benson, all their right in the remainder of the ranch. The part of the remainder which shall be allotted to the parties of the fourth part, shall be so chosen as to include 800 acres of the land now in the possession of Juan Jose Castro or his tenants.

The seventh article provides for allotments to be made so as to include lands conveyed by certain deeds in the parts allotted to certain of the parties.

The eighth article provides that the costs of partition, survey, map, report, etc., are to be paid by certain of the parties therein named.

By article 10 it is provided that, in consideration of the release before mentioned of Martina and her husband, the parties to the instrument release and convey to Joaquin Y. Castro, in trust for his wife and their children, 25 acres of the ranch; the same number of acres to Juan Jose Castro, in trust for his wife and their children. Like conveyances in trust of the same quantity of land are made to Gabriel Castro, Antonio Castro, to Victor Castro, to Jesus Maria Castro. In the same article it is provided that these tracts of 25 acres shall be so selected as to include the houses in which the trustees themselves respectively lived, and the further provision is made as to what parts these tracts are to be charged respectively; but by article 11, on making these allotments, the houses of Joaquin, Juan Jose, Antonio, Gabriel, and Victor are not to be charged to the shares derived from them.

The twelfth article then provides when and under what circumstances the deed, report, and map are to be filed for record by Forbes, one of the commissioners, and that the partition shall be executed and closed within three months from the time this agreement shall

be placed in their hands for the purpose of making the partition. This instrument purports to have been executed and acknowledged by nearly all of the parties to it. The survey, map, and report were made, and the deed, etc., were filed and recorded, on the twenty-eighth of August, 1857. The validity of this partition is called in question by the plaintiff and other parties to the action. In relation to it the court finds the following facts, which, in our judgment, are sustained by the evidence:

"That said commissioners attempted to make a partition and allotment under said agreement, of said land and other lands, and filed a report of their proceedings with the recorder of Contra Costa county, August 28, 1857, and the same was recorded in volume 6 of Deeds, pages 1 to 18, inclusive.

"That said agreement was not executed by all the parties interested in the fee of said rancho as tenants in common; that it was not executed by Joseph Emeric, James T. Dean, and others, tenants in common and owners of divers interests in said rancho; that a large number of the owners and tenants in common in said rancho refused to and did not sign or execute said agreement for partition.

"That said agreement purported to be executed on behalf of certain infants, owners and tenants in common of an undivided interest in said rancho, to-wit, Francisca M. de Soto and Marced M. de Welch, by one Vincente Martinez, as their attorney in fact, who had no power, authority, or right, as such, to execute for them said agreement, and the same was not executed by said infants, or either of them; and said infants were then married women, and their husbands, then living, did not join in the execution of said agreement.

"That said commissioners included in their survey, attempted partition, and report of the lands of said rancho 27,471 acres of high lands, and 2,470 acres of marsh lands, aggregating 29,941 acres, being an excess of say 12,003 acres more than was included in the final survey approved by said United States district and circuit courts, as aforesaid.

"That said commissioners made an attempted partition, recorded, as aforesaid, among said tenants in common, of the high lands above mentioned, and did not undertake to partition the marsh or marshy lands mentioned in their report and survey, and that said attempted partition included say 9,533 acres more than ever belonged to the rancho, some of which was part of the adjoining San Antonio or Peralta ranch, and allotted the same as a part of said rancho San Pablo.

"That said 9,533 acres were wholly outside the bounds of said rancho, as confirmed and patented as aforesaid, and said attempted partition did not allot to the parties to said agreement their equal share of the lands within the bounds of the rancho, and that said allotment of said excess was so made as to destroy the equality of said partition.

"That said commissioners reported, among other things, that as to the surplus marshy lands comprised in their survey, and by them supposed to belong to the said tract of the Rancho de San Pablo, said commissioners had called the same to the attention of the parties interested, and that said parties had decided that the surplus of marshy lands should remain for the present undivided; that the division thereof has never been completed; that the said surplus marshy lands comprised in said survey, and referred to by said commissioners, never has been divided; that the decision of some of the parties interested therein to allow such lands to remain undivided was not the decision of all, and did not comport with the terms of the submission to the said commissioners."

The court below, on the facts found by it, held the agreement and deed of partition dated July 14, 1856, void and ineffective. The above-mentioned deed and agreement have been twice before the supreme court of this state; first, in January, 1859, in the case of *Teuksbury v. Provizzo*, 12 Cal. 20, and the second time in October, 1862, in *Teuksbury v. O'Connell*, 21 Cal. 61. Both of these actions were ejectionment. In the case first cited the plaintiff deraigned title from a party to this deed, who executed it. The defendant's predecessor in interest was also a party to the deed. It is stated in the opinion of the court that the controversy in the cause turns upon two questions: "The *first* is, what is the effect of this deed of partition, supposing it to have been regularly carried into execution,—that is, is it an estoppel? The *second* is, has there been such a departure from its terms as to invalidate it, or the proceeding under it?" 12 Cal. 23. The decision appears to have been made on the deed alone, and it rested the estoppel of defendant on that instrument without other proof. There does not seem to have been any proof that the defendant, or his grantor or predecessor, ever acted under the deed; that either of them ever took possession under it.

The court states the contents of the agreement and deed of partition, and then proceeds to a discussion of the question of estoppel by the deed. The court in this discussion remarks as follows: "It has thus been seen [referring to a statement of the contents of the deed] that this instrument is what on its face it purports to be, to-wit, a deed of conveyance, release and partition. It is true that the release is not to take effect except by force of a future event, to-wit, the making of the partition and the recording of it. But we are unable to perceive why a deed like this may not be effectual on a future event, so, at least, as to estop a party on the happening of such event to controvert it. It may be conceded that this event was a condition precedent to the vesting of the estate provided for by the deed; as was the payment of the purchase money in the case of *Brannan v. Mesick*, 10 Cal. 95. But, within the principle of that case, it would seem that on the happening of the event, the deed became effectual as a partition and release. In this respect it is not material whether the several

parties were owners or had merely liens, as the deed, taking effect on the happening of the event, and purporting to release and convey all the title of the grantor, the grantor would be estopped to deny that he had title at the time. But apart from this we apprehend that when parties go into a partition of property upon certain terms and conditions, each to receive a several portion of a common estate, the instrument of partition, founded upon mutual releases, itself is such affirmation of interest and title on the part of each as to estop him to deny that he did have interest and ownership in the premises; and the release and conveyance of his interest to his parceners is evidence of title in his grantees which he cannot dispute. He takes, by virtue of the deed, all *their* interest, and cannot be allowed to say that he holds possession of what he conveyed and released by a title paramount to that which he conveyed. In this case there was no pretense that the possession of the defendant previous to the deed was by any different title than that which he conveyed and released; indeed, such possession was in entire consistency with such interest, and, it is fairly presumable, was held by him as a tenant in common under the title which he showed on the trial." 12 Cal. 24, 25.

The court, it will be perceived, held that the defendant was estopped to deny plaintiff's title to the lands sued for, set off under the deed of partition, both plaintiff and defendant claiming under parties to the deed. It does not appear, from the report of the case, that the fact that the deed was not signed by all the parties to it was brought to the notice of the court, or the further fact that the partition was made of land not included within the ranch. These facts are not adverted to by the court. If the attention of the court was called to them, it seems to us that they would certainly have been noticed and passed on. So, in construing this opinion, we must take it as a decision not affecting the matters just stated. There was a question made as to the allotment of Gutierrez. That is disposed of on the ground that the allotment was made by virtue of a contract authorizing such allotment, to which contract the parties under whom the defendant claimed were parties, of all of which the defendant was a purchaser with notice. Defendant was therefore held bound by this allotment.

The next point considered and passed on by the court was the objection that the partition was not binding, because the entire tract was not divided, but some marsh land was omitted from the division and allotment. We give the remarks of the court on this point in its own words: "The report of the commissioners on this subject is as follows: 'As to the surplus of marsh land comprised in this survey, and belonging to the said tract of the rancho de San Pablo, we have called the same to the attention of the parties interested, and they have decided that the said surplus of the said marshy lands should remain for the present undivided.' No proof was offered that this land was of any value, or that the division made was affected

in any manner by the failure to divide or allot it, or that the allotments made would in any degree have been affected by the allotments of this, or that any injury resulted to any one interested in consequence of this omission. Moreover, no objection seems to have been made to this allotment and partition on this account. Nor was any exception taken to the admission of this report and these proceedings of the commissioners as evidence, for the specific reason that the statement made by them was inadmissible proof of the facts of agreement and consent stated in the report. In no way, for so long a time after the report was filed and recorded, was there any protest or objection on this score until this defense, though, by the terms of the deed, the report and partition was to vest title. Important rights have vested under these proceedings, which a court would not disturb without great reluctance. There is, besides all this, *some* proof that the defendant, after the report, at least impliedly conceded that, so far as Saunders, one of these parties, was concerned, the title vested; for the witness Morgan says he, defendant, recommended a party to purchase from Saunders. Under all these circumstances, we think we shall not be warranted in holding that these proceedings are void because of this omission."

It cannot be held that the court would have ruled as they did in this case if the facts mentioned above had been brought to their notice. The deed is treated throughout the opinion as having been executed by all the parties owning interests in the tract of land described. The court in stating the case says: "The plaintiff on the trial offered and read in evidence a paper purporting to be a deed of partition of the rancho San Pablo, the parties, who were very numerous, claiming to be the owners, and interested in that rancho; and the deed recites that 'it was made in order to settle all disputes touching said rancho, and make amicable partition thereof.'" Further, the court said: "The plaintiff claims the premises through a deed from one of the original owners, whose share, as allotted by the commissioners, he represents." "The defendant's predecessor in interest was a party to this deed of partition." 12 Cal. 22, 23. The court then proceeds to consider the question of estoppel, and to decide it on the contents of the deed alone.

In the case cited from 21 Cal. 60, (*Tewksbury v. O'Connell*), other points in relation to this deed were presented, considered, and decided. We proceed to examine the case just referred to, to ascertain what was adjudged therein. The plaintiff brought ejectment to recover certain premises, which were a part of the San Pablo rancho. The defendant claimed to be an owner of an undivided one twenty-fourth part of the rancho. He set up this title and denied the alleged right of plaintiff, and, for a further answer, set up as an *equitable defense* that the plaintiff claims title in severalty to the demanded premises under and by virtue of a certain agreement for a partition of the same rancho, which agreement, and the proceedings taken under it,

the defendant charges are void, and asks to have them so adjudged. The plaintiff filed a replication, in which he admitted that he claimed title in severalty under this agreement, and asserts the validity of the agreement and the proceedings under it. The issue arising out of the equitable defense was tried separately and a judgment was rendered that the agreement was void against the defendant and his grantors, and the further prosecution of the action by plaintiff was enjoined. An appeal was taken by plaintiff from this judgment and an order denying his motion for a new trial.

The grantors of both plaintiff and defendant were parties to and executed this agreement, which was the agreement and deed above stated of date fourteenth of July, 1856. On the trial the plaintiff offered this agreement in evidence. Its admissibility was objected to by defendant on the ground that it had not been executed by John T. Dean, Francisco Martinez de Soto, Merced Martinez de Welch, and Jose Ramon de Castro, who were named as parties to it, nor by Joseph Emeric, not named as a party, but who was admitted by the pleadings to be interested in the rancho. The objection was sustained, and plaintiff excepted. The court affirmed the judgment, and, we suppose, the order denying a new trial. The court states the point to be decided thus: "No question is made but that this agreement is valid against the defendant, if it was valid against his grantors. The first point, therefore, which arises in this case is whether this agreement is valid and binding against those who executed it, although it has not been executed by others who are named in it as contracting parties, and who are declared in it to have interests in the land proposed to be partitioned." 21 Cal. 67.

The contents of the agreement are briefly stated by the court, and it then proceeds to dispose of the point as follows: "The plaintiff claims that upon such allotment being made, the agreement took effect as a release and conveyance by those who executed it to the other parties, of all their title and interest in the parts allotted severally to those other parties; and thus that the grantors of the defendant have conveyed to the grantors of the plaintiff all their title to that portion of the rancho allotted to the plaintiff's grantors, and which embrace the demanded premises. If this be so, the result will be that the defendant's grantors will have parted with their undivided interest in the whole of the rancho except that portion allotted to them, but have not a complete title in severalty to the portion allotted to them, inasmuch as the agreement and the proceedings under it can have no effect to transfer to the defendant's grantors the undivided interest in the portion allotted to them which belonged to the parties who did not execute the agreement. The defendant claims that the possibility of such an injustice is a conclusive argument in support of his position that an agreement like the one in question, between several parties, where performance by one is the consideration for the performance by the other, could not be intended to be, and cannot leg-

gally be, held to be binding upon any party until executed by all. In support of the defendant's position the case of *Townsend v. Corning*, 23 Wend. 435, is cited, in which Judge BRONSON says: 'A writing *inter partes* is prepared, by which one party is to covenant for the payment of money and the other for the conveyance of lands—each of these mutual covenants being the consideration for the other. One party sits down and executes, but the other stops short, and for some cause, no matter what, does not execute the instrument. It is impossible, I think, to maintain that the party who has refused or neglected to bind himself can set up the instrument as a binding contract against the other party. There was, I think, a condition implied, from the nature of the transaction, that the signing of one party should go for nothing unless the other signed also. But whether I have assigned the proper reason for the rule or not, the conclusion to which I have arrived, that the party who signs cannot be bound where the execution is thus incomplete, is not only in accordance with the justice of the case, but is well supported by authority.' See, also, the cases of *Livingston v. Rogers*, 1 Caines, 584, and *Emery v. Neighbour*, 2 Halst. Com. Law, 145. These authorities fully sustain the defendant's position. In the absence of any circumstance other than what appears on the face of the instrument, we think it cannot be held that this agreement was executed by the plaintiff's grantors and delivered to take effect like a deed poll, upon their affixing their own signatures, but that it was an inchoate instrument, only to become effective when executed by all the persons named as parties." 21 Cal. 68, 69.

The question was disposed of, and the agreement held void, on the distinct ground that it was not signed by all the persons named as parties.

It does not appear in this case that the attempted partition included lands not within the rancho San Pablo, or, if it did, it was not noticed by the court. If it did appear, the court, no doubt, considered the point discussed sufficient to dispose of the case, and therefore did not allude to it. It will be observed that in this opinion the case of *Tewksbury v. Provizzo*, *supra*, was not referred to, although it was cited by counsel for appellant. We see no contradiction in the opinions rendered in these cases. The facts were not the same in both cases, and the former could not, and did not, rule the latter. The above question in 21 Cal. was rendered during the October term, 1862. It has remained unmodified by any subsequent judgment to the present time. We would not be justified in disregarding it, after the lapse of nearly 20 years, during which time, doubtless, many contracts and conveyances in regard to this land have been made upon it. We are compelled, then, to hold that the judgment of the court below, that the attempted partition of 1856 was null and void, is correct.

The court finds that the commissioners included in their attempted partition 12,003 acres more than was included in the survey approved
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by the United States courts. This is sustained by the evidence. It seems to us that this is fatal to the attempted partition, and that this position is sustained by *Hathaway v. DeSoto*, 21 Cal. 192, which was decided at the same term and by the same court which decided *Tewksbury v. O'Connell*. The ruling in *Hathaway v. De Soto* is substantially approved in *Sutter v. San Francisco*, 36 Cal. 116. We cannot see how a partition can stand in which a much larger tract is included in the partition than the tract to be divided includes. Suppose several of the parties in interest are allotted portions outside of the tract to be divided, is there any equity which would justify such partition? It may be that parties may contract on such stringent terms that they are bound, though lands allotted to them are outside of the tract to be partitioned. But there is no such contract called to our attention in this case. It is said that this partition of 1856 was acquiesced in by all who were parties to it for 10 years. The evidence does not convince us of this; further, the court below in effect found the contrary, which, in our judgment, is sustained by the evidence. Connected with the deed of partition of 1856, and to some extent arising out of it, is what is known as the "Lawyer's title." The history of this title is thus given in the findings of fact:

"That on the twelfth day of August, 1851, Martina Castro de Alvarado, signed and delivered to one Juan N. Espejo, an instrument purporting to be a power of attorney from her to him, and which was afterwards recorded in the office of the county recorder of said Contra Costa county, on March 11, 1853, in volume 2 of Deeds, page 471; that said instrument purported to appoint said Espejo her true and lawful attorney; among other things, to commence and prosecute an action for the partition of the Rancho San Pablo; to appear for and defend her in any suit or action whatsoever; to sign any bond, contract, or agreement that to him should seem proper; to pay and settle all debts and demands against her; and to give in payment, any part or parts of her property, whether real or personal; and to make all necessary deeds or conveyances for the same, or any part thereof; to take possession of any lands and tenements belonging to her, or in or to which she might be entitled; and finally, for her and in her name, to do all such deeds, acts, and things in relation to her property, estate, affairs, and business of every kind as she herself might or could do if personally present and acting therein, with authority to appoint a substitute; and pledged her property, real and personal, to her said attorney for any advances he might make on her behalf; which said instrument was witnessed by one George Charles Porhte. It was acknowledged before Edson Adams, justice of the peace for Contra Costa county, August 12, 1851, by the said subscribing witness, and her identity was proven by his oath, but the said instrument was never acknowledged by said Martina, personally. Her husband, Juan B. Alvarado, did not join with her in its execution, but on October 12, 1852, he signed and acknowledged an instrument.

before George T. Hunt, notary public of San Francisco, California, which purported to approve and ratify the above-mentioned instrument signed by her in favor of the above-mentioned Espejo.

"That on the sixteenth day of August, 1851, he, said Juan N. Espejo, purporting to act as attorney in fact of said Martina Castro de Alvarado and in her name, together with one Eugene Musson, executed a certain instrument, purporting to be a contract between said Martina Castro de Alvarado and said Musson, and which said instrument was afterwards recorded in the office of the county recorder of Contra Costa county, on March 11, 1853, in volume 2 of Deeds, page 474.

"That said instrument recited that said Musson had covenanted and agreed to conduct, manage, and carry to a final determination an action for the partition of the Rancho San Pablo and its dependencies and appurtenances, and to defend said Martina against the adverse claims of her brothers to said rancho, and that in consideration thereof the said Martina should give in payment for such services the one-tenth part of her interest in or to the said Rancho de San Pablo as soon as the said suit in partition should have been brought to a final determination; the fees, costs, charges, and other court expenses to be advanced by said Musson, to be refunded by said Martina, with three per cent. per month interest thereon at the termination of said suit. That said purported agreement or contract was not signed, acknowledged, or executed by said Martina individually. Her husband, Juan B. Alvarado, did not join in the execution of said instrument, but on October 12, 1852, he signed and acknowledged an instrument before George T. Hunt, notary public of San Francisco county, by which said last-mentioned instrument he purported to approve, confirm, and ratify the said instrument so as aforesaid attempted to be executed by said Martina by her pretended attorney in fact, Juan N. Espejo.

"That on January 14, 1862, Joaquin Y. Castro and Eugene Musson executed a certain other instrument purporting to be a contract between said Castro and Musson, and which said instrument was afterwards recorded in the office of the county recorder of said Contra Costa county, on March 11, 1853, in volume 3 of Deeds, page 1.

"That by said instrument the said Joaquin Y. Castro assumed to employ and retain the said Musson to assist him in the administration of the estate of his deceased father, Don Francisco Maria Castro, until a final settlement of the same, to apply to the probate court of said Contra Costa county for letters of administration of said estate, and to present the title of said representatives of said estate to said rancho of San Pablo to the board of United States land commissioners and have the same confirmed. That in consideration of services rendered and to be rendered in the premises by the said Musson, he was to have the whole amount of commissions that said Joaquin Y. Castro would be entitled to as administrator of the said estate, dis-

tinct and apart from the fees usually paid to counsel for professional services rendered by them in matters similar to the one referred to in said agreement; that said Musson should be entitled to such fees as his services to said estate should be reasonably worth, independent of the services personally rendered to said Joaquin in the premises aforesaid, and all advances, traveling expenses, and other disbursements by Musson to be repaid him in due course of administration by said Joaquin. The agreement further provided that, should the probate court of Contra Costa county empower said Joaquin, as administrator of said estate, to present for confirmation the title of the representatives thereof to the rancho of San Pablo to the board of land commissioners, Joaquin Y. Castro should give, in payment of the services to be rendered by Musson, the one-tenth part in value of said tract of land or Rancho de San Pablo so confirmed. That said Musson did not perform or render the services stipulated on his part to be performed and rendered, and has never accomplished the result contemplated by said contract, or either of them, nor has he been released from the performance thereof."

In relation to this title and bearing on the facts as above found, the court held, as a conclusion of law, as follows: "That the claim of interest in said Rancho de San Pablo, commonly called and known as the 'Lawyers' title,' and the instruments upon which it is predicated, to-wit, said instrument purporting to be a power of attorney from said Martina Castro de Alvarado to one Juan N. Espejo, dated August 12, 1851, said instrument purporting to be an agreement or contract executed by Eugene Musson and said Martina Castro de Alvarado, by her attorney in fact, Juan N. Espejo, dated August 16, 1851, and said instrument purporting to be an agreement or contract executed by said Eugene Musson and Joaquin Y. Castro, dated January 14, 1852, which are referred to in the foregoing finding nineteenth, were, and are all and every of them, void and ineffective, and all subsequent acts and claims thereunder, or based thereon, were and are invalid and ineffective, in so far as they purported or purport to convey or affect any interest in the lands of said rancho, or any part thereof."

So far as this lawyers' title depends on the deed of 1856, it must fall with it, for the reasons appearing above. So far as it depends on contract, it appears that the services required under the contracts to be rendered were never performed, and we cannot perceive that any right arises under such contracts. Certainly, there could not be any recovery upon such contracts as having been performed, for there was never any performance. If performance was waived, and conveyances then made, a different question would be presented; but we do not see that any performance was waived. Whatever waiver there was arose by virtue of the provisions of the deed of 1856, which was properly held null and void. There can be hardly a doubt that there was no intention to waive the services under the contracts referred to by

the partition deed unless it was valid. The deed being void, the parties were remitted to their rights under the contracts, and there having been no performance, we cannot see that any right vested in the lawyers, save, *perhaps*, to recover for services accepted what they were reasonably worth. But on this latter point we decide nothing. The contracting parties must seek whatever redress they are entitled to by the remedies which the law affords.

The court below held certain contracts, and a power of attorney set forth in the finding last quoted, and in the conclusions of law quoted also above, void and ineffective, and all subsequent acts and claims thereunder or based thereon, void and ineffective, in so far as they purport to convey or affect any interest in the lands of said rancho or any part thereof. Inasmuch as there was no performance of the services under these contracts, we think the court below properly held that they gave no right, legal or equitable, to the land. We do not understand by this that the court intends to hold that subsequent contracts, valid in their character, though arising out of the contracts referred to, may not have conferred on the lawyers employed—Musson, Sanderson, and Hepburn, or those claiming under them—a legal or equitable right to participate in the division of the land.

In regard to a deed to Henry Wilkins the court found as follows: "That on the fifteenth day of July, 1856, Martina Castro de Alvarado and Juan B. Alvarado, her husband, executed and delivered to Henry Wilkins a certain instrument purporting to be a conveyance of certain interests in the said San Pablo rancho, which said instrument was recorded in the office of the county recorder of Contra Costa county, on September 29, 1857, in volume 6 of Deeds, page 57; that on the same July 15, 1856, the said Henry Wilkins executed and delivered to said Martina Castro de Alvarado a certain other instrument, purporting to be a declaration or acknowledgment of trust, which said last-mentioned instrument was recorded in the office of said county recorder, on the said September 29, 1857, in volume 6 of Deeds, page 58; that by and in said last-mentioned instrument the said Henry Wilkins acknowledged that the lands mentioned in said first-mentioned instrument were held by him in trust—*Firstly*, to join in such deed and agreement for a partition of said San Pablo rancho as said Dona Martina Castro de Alvarado should become a party to and sign; and, *secondly*, to convey such interest as should remain in him, after joining in such deed of and agreement for a partition, to Joseph Emeric as soon as said Emeric should so arrange with Jesus Maria Castro, that said Castro should convey all his interest in said rancho to the said Emeric, and said Emeric should, simultaneously with or after such conveyance, ratify said deed of and agreement for a partition, so that said partition should stand; and in the event that such arrangement, conveyance, and satisfaction should not take place, then to be held in trust for the benefit of the parties to said deed of partition, in the proportion and in the manner therein indicated, and in

so far as might be to maintain and carry out the same; that said instruments constituted parts of one and the same transaction, and were, in fact, an integral part of said agreement for partition, to stand or fall with the same; and that their object and purpose, and the only consideration upon which they rested, was such partition, to facilitate and perfect which they executed as aforesaid." This finding is sustained by the evidence.

The conclusion of law as to this deed to Wilkins is that it is void and ineffective, and did not convey to Wilkins, as trustee or otherwise, any interest in the rancho out of Martina Castro de Alvarado, or her husband, and that no trust was created thereby. The court properly held that the deed was void and ineffective, as it was dependent on the partition deed of 1856.

In regard to certain deeds which, in the progress of this cause, have acquired the appellation of "*lieu* deeds," the court found the following facts:

"That on March 21, 1862, the said Martina Castro de Alvarado and Juan B. Alvarado, her husband, by deed of conveyance dated on that day, acknowledged March 21, 1862, and recorded March 22, 1862, in volume 9 of Deeds, page 540, in the county recorder's office of said Contra Costa county, gave, granted, bargained, sold, and conveyed to Maria Victoria Delfina Alvarado, daughter of said Juan B. and Martina, all their right, title, and interest, divided or undivided, in and to the said tract of land so known as the Rancho de San Pablo, together with all and singular the tenements and hereditaments, including orchards, fences, houses, and all other improvements thereon, belonging to said parties of the first part.

"That afterwards the said Maria Victoria Delfina Alvarado, daughter and grantee of Martina Castro de Alvarado, and Juan B. Alvarado, her husband, as aforesaid, and who had, as aforesaid, succeeded to all their right, title, and interest in the said San Pablo rancho, executed and delivered on the dates, and to the grantees hereinafter mentioned, deeds of conveyance whereby she, in the terms in said deeds contained, and hereinafter specified, remised, released, and quitclaimed to said grantees, respectively, various undivided sections of said rancho, in lieu of certain specific portions of said rancho, described in certain previous deeds which had been executed and delivered to such persons or their grantors by said Martina Castro de Alvarado and Juan B. Alvarado, which said previous deeds purported to convey all the right, title, and interest of said Martina and Juan B. Alvarado, in said specific tracts, by metes and bounds; that each of said first mentioned deeds, commonly known as '*lieu* deeds,' recited such previous conveyance or conveyances, in lieu of which it was given, and purported to convey an undivided portion of said rancho, equal and equivalent in quantity of land to such specific tract or tracts described in said previous deeds; that said grantees named in said '*lieu* deeds' received and accepted the same with the intent to

receive and accept, and it was the intent of the grantor thereby to convey, undivided interests in said rancho, equal and equivalent in quantity of land to and in lieu of such specific tract or tracts described in said previous deeds, respectively.

"That said grantees were not, nor was any of them, deceived, imposed upon, or defrauded into accepting or receiving said lieu deeds, or any of them; nor was there any combination, confederacy, conspiracy, fraud, or undue influence by anybody in connection with said lieu deeds, or the execution or receipt of them, or any of them; that said lieu deeds were executed, delivered to, and received by the following named grantees on the dates, and were recorded by them on the dates, and in the office of the county recorder of said Contra Costa county, as follows, to-wit:" (Here follows a specific list and findings as to the grantees in these *lieu deeds*.)

The foregoing finding of facts is sustained by the evidence.

As regards these *lieu deeds*, the court found the following conclusion of law, which in our judgment is a correct legal deduction from the facts found: "That the respective deeds of conveyance executed by Maria Victoria Delfina Alvarado, daughter and grantee of Martina Castro de Alvarado and Juan B. Alvarado, her husband, mentioned in the foregoing finding twenty-fourth, were and are valid and effective for the uses and purposes expressed in them, and take the place of the respective deeds therein respectively mentioned, and in lieu of which they were respectively given and accepted, as between the parties thereto and their successors in interest."

It is contended that the acceptance of these *lieu deeds* by the grantees therein did not estop them from claiming under their original conveyances, or divest them of title legal or equitable, which vested in them thereby. The parties claiming under the lieu deeds are estopped to claim the lands in their original conveyances, in lieu of which these deeds were given. They are estopped by the terms of their contract. They were given and accepted in lieu of the former conveyances. They cannot then hold under the lieu deeds and against them, too. In other words, they cannot blow *hot and cold*, or assume inconsistent positions. See Broom, Leg. Max. "*Allegans contraria non est audiendus*," p. *169, etc. Whether they are thus divested of whatever title was conveyed by the original deeds, without a reconveyance in each case, is immaterial. They are in equity; and if necessary in the further progress of the case the court can compel such reconveyances as are required, unless the rights of innocent purchasers have intervened; but there is no finding here that there are any such purchasers.

In relation to certain actions brought by Antonio Castro, the court found the following facts:

"That on October 15, 1851, Antonio Castro, who is otherwise known as Pablo Antonio Maria Castro, commenced an action in the then district court of the state of California, in and for the county of

Contra Costa, against Joaquin Y. Castro, to recover the sum of four thousand dollars and costs; that on October 23, 1851, the defendant, Joaquin Y. Castro, appeared in said action and filed his answer therein; that on the third day of January, 1854, the following order was entered in said action in the district court of the Seventh judicial district of said state, in and for said Contra Costa county, viz.:

“Antonio Castro v. Joaquin Y. Castro.

“On motion of plaintiff's attorney, ordered a nonsuit be entered, and that execution herein be stayed until the first of November, 1854, and that the costs herein bear interest at two per cent. per month;’ that there are on the page of the judgment book, in which said judgment of nonsuit was entered, and under the certificate of authentication thereto, the following word, character, and figures, viz.: ‘Costs, 62.85\$,’ which were placed there long after the rendition of said judgment and the adjournment of the term at which it was rendered, without the authority of said court, and they formed no part of said judgment; that on October 29, 1855, the clerk of said court, treating the said order, word, figures, and character as a monetary judgment in favor of said Joaquin Y. Castro and against said Antonio Castro, issued under the seal of said court, and to the sheriff of said Contra Costa county, a paper purporting to be an execution, reciting that a judgment had been rendered, and commanding him to make out of the property of Antonio Castro the sum of \$62.85, with interest at the rate of two per cent. per month from the date of said judgment of nonsuit, and accruing costs.

“That on October 15, 1881, the said Antonio Castro commenced another action in the same Third district court against Juan P. Eduarte to recover the sum of \$700; that the said defendant, Eduarte, appeared in said action and filed his answer therein; that afterwards, and before October 4, 1853, the said Eduarte died, as appears by the adjudication of said court, by an order entered on the minutes thereof on October 4, 1853, in the following language, to-wit:

“Antonio Castro v. Juan Pablo Eduarte.

“The death of defendant being suggested and admitted by counsel, it is ordered that the suit be revived against the heirs and legal representatives of the deceased defendant;’ that afterwards, on January 3, 1854, and after the said Eduarte had departed this life, the following order was entered in the district court of the Seventh judicial district of said state, in and for said Contra Costa county, and in said action, viz.:

“Antonio Castro v. Juan B. Eduarte.

“On motion of plaintiff's attorney, ordered that a nonsuit be entered, and that execution herein be stayed until November 1, 1854, and that the costs herein bear interest at two per cent. per month;’

that there are on the page of the judgment book, in which said judgment of nonsuit was entered, and under the certificate of authentication thereto, the following word, character, and figures, viz.: 'Costs, 63.20\$,' which were placed there long after the rendition of said judgment, and the adjournment of the term at which it was rendered and entered in said book, and without the authority of said court, and they formed no part of said judgment; that on October 29, 1855, the clerk of said court, treating the said order, word, figures, and character as a monetary judgment in favor of Juan P. Eduarte and against said Antonio Castro, issued under the seal of said court, and to the sheriff of said Contra Costa county, a paper purporting to be an execution, reciting that a judgment had been so rendered, and commanding him to make out of the property of Antonio Castro the sum of \$63.20, with interest at the rate of two per cent. per month, from the date of said order of nonsuit, and accruing costs."

Executions on these proceedings were issued, treating the same as money judgments against Antonio Castro, levies on his interest were made on them, and it was advertised and sold, and deeds made to the assignee of the purchaser. The court found, as a conclusion of law, these judgments were void and ineffective—or rather that there were no such judgments—and that the purchaser derived no title under them. It is contended that this conclusion was erroneous. As the practice act of 1851 stood at the time in which these proceedings were had, the party in whose favor judgment was rendered was required to deliver to the clerk of the court a memorandum of the items of the costs to which he was entitled. The memorandum sworn to, as required by the statute, was to be delivered to the clerk within 24 hours after the rendition of the verdict. Pr. Act 1851, § 510. By section 511 of the same act the clerk was required to include in the judgment entered up by him the costs, the percentage, etc.

In *Chapin v. Broder*, 16 Cal. 413, in relation to a judgment for costs, bearing date the twenty-second of August, 1854, the court held that the clerk had no right to insert the costs after the judgment was entered up and the record completed. The court remarked as follows: "The language of the statute was that he [the clerk] should include the costs in the judgment, and not that he should enter the judgment and at some subsequent period insert the costs. His authority terminated with the entry of the judgment, and if, by mistake or otherwise, the costs were omitted, the remedy was by motion to amend. The court alone was competent to grant the relief, and the act of the clerk was illegal and void."

In the case cited, the court held such judgment void on a collateral attack. This ruling must govern in this case. It does not appear from the finding of fact that the costs were ever included in these judgments entered against Antonio Castro. A note appears to have been made of the amounts of costs, under the certificate of authenti-

cation to the entry of the judgment in the judgment-book, and these amounts were not included in the judgments. On this ground the court below properly adjudged that the judgments were void. The proceedings of sale, etc., under these so-called judgments, fall with the judgments, and conferred no title on purchaser.

The petition of J. Y. Castro to the board of land commissioners for confirmation of the claim for the rancho San Pablo was offered in evidence. To this Mr. Brooks, on behalf of the defendants represented by him, objected *generally*, conceding at the same time that it would be admissible "to show the jurisdiction of the land commission, and support the final decree of confirmation;" but he states that it was not offered in connection with any other proceedings, but as an independent document. The court overruled the objection, and an exception was made and noted. It is a mistake that it (the petition) was not offered in connection with other proceedings. It is stated in the bill of exceptions that it was offered along with the copy of the will attached to the petition, the opinion of the board confirming the claim and the decree of confirmation. Although such petition was not necessary in presenting the claim for confirmation,—see eighth section of the act of congress of third of March, 1851, "to ascertain and settle private land claims in the state of California," (9 St. at Large, 631,)—as the presentation of the claim or grant was sufficient, still we do not see that the evidence was not admissible. In *Tappan v. Beardsley*, 10 Wall. 427, it was held admissible to prove the fact that such a proceeding was instituted, the date, and the result. We find no error in the ruling of the court below in admitting the document. The legal effect of the document was not passed on by admitting it in evidence.

The plaintiff offered in evidence a deed from J. Y. Castro to Martina Castro de Alvarado and others. This deed was objected to on the ground that the grantor, being a trustee, could not alter the trust or lien the land without the consent of the *cestuis que trusten*. The objection was overruled, and an exception was taken. The deed objected to purports to convey the legal title, which it is recited it had been suggested, had vested in the grantor by virtue of the decree of confirmation of the board of land commissioners of the rancho San Pablo, in trust for the various parties in interest according to their respective interests, viz., to Martina Castro de Alvarado, fifteen twenty-seconds of the rancho, and to five of his brothers, five twenty-seconds thereof, and to other parties, heirs of Francisco Maria Castro, or parties claiming under them, an undivided four-fifths of one twenty-second part. This conveyance was made with the declared purpose of conveying to the grantees the legal title to their shares in the land. The objection went merely to the effect of the conveyance. It was properly admitted in evidence. The operation or legal effect of the conveyance was a matter for further consideration, when the court came to render judgment. The court did not err in its ruling.

The motion to dismiss the action was properly denied.

There was no error in disallowing the question put to Forbes as to whether the mental capacity of Dona Gabriela "was sufficient to enable her to comprehend an American deed translated into Spanish." Forbes substantially answered the question in his testimony.

The statement of Carrera to Goodale, made long after the transaction to which it referred, was hearsay, and was properly excluded. There was no evidence of a fraudulent conspiracy. If there was, there is no evidence that Carrera was one of the conspirators, and if he was, it was hearsay, being no part of the *res gestæ*.

We perceive no error in the ruling of the court in relation to disallowing the question as to the difference between the original draft of the partition, agreement, and the perfected document. Besides, the witness subsequently stated everything that was inquired about when the objection was made.

We have examined the other errors in law to which exceptions were taken, and find that the court committed no error in its rulings in regard to them.

The statute does not require the order appointing a guardian *ad litem* for an infant to appear in the judgment roll. See Code Civil Proc. § 670. The first subdivision of this section plainly does not require it. The second subdivision specifies what papers shall constitute the judgment roll in all other cases, except where the complaint has not been answered by any defendant. These papers are the pleadings, a copy of the verdict of the jury or finding of the court or referee, all bills of exceptions taken and filed, a copy of any order made on demurrer or relating to a change of parties, and a copy of the judgment. A further provision is made in this section in a case where there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default. In this last case the summons, with the proof of its service, must also be added to the other papers above mentioned in this second subdivision. In neither of the subdivisions is the order of appointment of guardian mentioned. The order relating to a change of parties does not include any such order. There is no change of parties by the appointment of the guardian *ad litem*. The guardian does not become a party. The infant is the party, and he only appears by the guardian. The latter is appointed to appear for the infant, and to manage and take care of the suit for such infant when he is plaintiff, and to appear, manage, and take care of the defense of the infant when he is defendant. In case of an infant defendant, the answer is put in by the guardian for the infant. The guardian has authority to appoint an attorney to put in such answer, but the attorney so appointed is the attorney of the guardian, and not of the infant. The language of the statute of this state, in all the phases it has assumed, authorizing the appointment of a guardian for infants in actions brought by or against them, shows clearly that the infant only is the party. See

Pr. Act. § 9; Code Civil Proc. § 372. The guardian is to appear for them, and is no more a party to the action than the attorney who appears in an action for one who has attained his majority is a party to the suit in which he enters his appearance. See *Fox v. Minor*, 32 Cal. 116; *Karr v. Parks*, 44 Cal. 48. For the reasons above given, we do not think that the order relating to a change of parties mentioned in the second subdivision of the section above cited includes an order appointing a guardian *ad litem*, and in no case is such an order required to be inserted in the judgment roll.

In England it appears to be different. See 1 Tidd, Pr. 100; 2 Saund. 1171, note 1. The practice in the English courts seems to be this: In the case of an infant plaintiff suing by guardian or *prochein amy*, it is stated in the declaration that the guardian is specially admitted, and when this is omitted it is error; and the insertion of those words in the declaration or plea has been holden to be sufficient and no error, though there be no admission of the guardian or *prochein amy* on the roll. *Rawlyn's Case*, 4 Rep. 53b, 54a; *Swift v. Nott*, 1 Sid. 173. If in fact there be an admission of the *prochein amy* or guardian by the court, but it is not entered of record, the court will give leave to enter it. *Young v. Young*, Cro. Car. 86; *Conabers v. Watton*, 1 Lev. 224.

On appeal from a judgment the examination in this court is confined to the judgment roll, and any bill of exceptions, statement on motion for new trial, and statement of the case on which the appellant relies. Code Civil Proc. § 950. The question to be considered must arise on these papers. If they do not thus arise, the duty of deciding them is not by law devolved on the court. *Rush v. Casey*, 39 Cal. 339; *McAbee v. Randall*, 41 Cal. 136; *Gregory v. Nelson*, Id. 278. On an appeal from an order denying a new trial, the scope of inquiry is limited to the order appealed from, and the judgment roll and the affidavits or bill of exceptions or statement used on the hearing. Code Civil Proc. §§ 952, 661. Where an appeal is taken from an order granting or refusing a new trial, on the minutes of the court, or from an order granting a new trial by the court on its own motion, a statement prepared subsequently to such ruling of the court, with the judgment roll and a copy of the order, constitute the papers on which the same are to be heard. Id. §§ 661, 662. Transcripts of these papers are only furnished to this court in cases of appeal above stated.

Holding, as we have said above, that the scope of inquiry in this court is not enlarged on appeal from an interlocutory judgment in partition, we do not perceive that we are permitted to look outside of the documents which would constitute the judgment roll when it is to be made up, or to consider any questions not arising on such documents or the statement or bill of exceptions in the case. Neither is the order appointing the guardian, nor the petition for such appointment, one to appear in the record or judgment roll under our practice.

In fact, we do not think a petition in writing for such appointment is required. The appointment is to be made on application, (see Pr. Act, § 10, and Code Civil Proc. § 373,) and this application may be made *ore tenus* in open court as well as in writing. Although it would be better practice to file a petition alleging the facts requisite to show the jurisdiction of the court, still it would not be *mala praxis* to make the application for such appointment orally.

We proceed now to consider the matters to which the foregoing observations as to the appearance of infants are pertinent. It is stated in the bill of exceptions that no summons was served upon the infant defendants Francisco Dutra, Juan Dutra, Jose Dutra, Mary Dutra, Maria Magdalena Dutra, Augustine Dutra, Ignacio Dutra, Maria Dutra, Maria Dolores Dutra, Felecia Dutra, Willie B. Palmer, Laura A. Palmer, Cassie A. Palmer, Nellie B. Palmer, Millie V. Chambers, Fannie R. Chambers, Thomas J. A. Chambers, James Lloyd Chambers, Robert Newcomb Wood, Richard Cross Wood, Lucetta Wood, Annie E. Wood, Frank G. Wood, William Henry Wood, Mary Moitozo, Antonio Moitozo, Ignacio Moitozo, Rosa Moitozo, and Angelica Moitozo, or either of them. These infants were not original parties to the action, and in regard to them the following appears by the recital in the decree: "And it further appearing that the other of said infants above named, who were not original parties to said action, were children of original parties who had died since the commencement of said action and since the filing of their answers herein; and it further appearing that in all such cases the executors or administrators of such deceased persons had been substituted in place of said decedents, and the action continued against them, and that such executors or administrators had respectively appeared herein on behalf of the interests of the estates of such deceased persons; but that application was also made to have guardians *ad litem* appointed for such infant children of persons who had appeared and answered in said action and afterwards deceased." The decree further states that William H. Patterson, Esq., an attorney of this court, was appointed guardian *ad litem*, among others, of Frank Dutra, Juan Dutra, Jose Dutra, Augustine Dutra, Maria Dutra, and M. Magdalena Dutra, and duly filed answers in the cause as such guardian *ad litem*, and on behalf of such infants and each of them.

In relation to the Palmer infants above mentioned, it is stated in the decree that B. S. Brooks, Esq., an attorney of the court, was appointed guardian *ad litem* of William Beales Palmer, Laura Adeline Palmer, Clara Augusta Palmer, and Nellie Bell Palmer, and duly filed an answer in the cause as guardian *ad litem*, on behalf of such infants and each of them. The answers for the Palmer infants and the Dutra infants, except M. Magdalena Dutra, appear in the record. As to the Wood and Moitozo infants, the record shows that the action was revived as against them on motion of their general guardians respectively, and on motion the answer of their ancestors was

in each case allowed to stand as their answers. As regards the Chambers infants, it appears by recital in the decree that each of them had a general guardian of their estates regularly appointed; that the guardian, who in this case was Caroline M. Chambers, was allowed by the court to represent them and their interests in the action, and that the guardian did appear and file an answer as such guardian, and for the infants above referred to. This answer appears in the record.

It was unnecessary to issue a summons to bring in the infant parties. It might be done on motion under section 385, Code Civil Proc.; Prac. Act, § 16. This section as it stood in the practice act was somewhat modified by the Code of Civil Procedure, § 385, from what it was as originally framed, and was further modified in 1874, but these changes do not affect the question here. Under the section as it stood in the practice act, or under any of its subsequent modifications, the infants might have been made parties and the suit continued against them on motion. The motion and order were sufficient. See *Allen v. Walter*, 10 Abb. Pr. 379; *Coon v. Knapp*, 13 How. Pr. 175; *Gordon v. Sterling*, Id. 405; *Greene v. Bates*, 7 How. Pr. 296. In *Gordon v. Sterling*, *supra*, infant defendants were thus brought in in an action for partition, and it was held regular under section 121 of the New York Code of Practice, which, as to this question, is the same as ours. This section (121) provides that if the motion is not made within a year after the death, a supplementary complaint was necessary. In *Gordon v. Sterling* the motion was within the year. It is therefore on all fours with this case, as regards the question presented. The order continuing the case as against the infant defendants should have been served, and no doubt was. They appeared in the case and answered regularly. This is sufficient. *McCreery v. Everding*, 44 Cal. 286. The only objection to the proceeding appearing in the bill of exceptions in the case before us is that no summons was served on the infants. The above in our opinion disposes of this point.

As to the appointment of guardians, we see no reason to hold that they were not properly and regularly appointed. The Wood, Moitozo, and Chambers infants appeared by their general guardians, and this was regular, according to *Gronfier v. Puymiol*, 19 Cal. 629, approved in *Smith v. McDonald*, 42 Cal. 484. These decisions have stood so long as correct rulings that we would hardly undertake to overrule them. As regards the others, and in fact all of them, we think no summons was required to give the court jurisdiction, for the reasons given above. The section of the Code of Civil Procedure (373) referred to by counsel, in our opinion, only applies to the original process issued when parties are brought in for the first time, and not to those brought in as representatives or successors of parties deceased. We see no reason to conclude that the *guardians ad litem* just above referred to were not regularly appointed. The court seems to have been

careful in appointing the guardians last named, having selected for that purpose two competent and distinguished members of the bar. It sufficiently appears that these infants were brought in and regularly proceeded against, and in this regard we find no error.

The attention of the court is further called to the fact that there is in the transcript no petition for or order appointing a *guardian ad litem* for George Preston Warfield and Teresa Ada Warfield, minor heirs of Preston Warfield, deceased. These minors were non-residents of the state on the nineteenth of November, 1867, when this action was commenced, and were served with summons by publication. Their residences were not known, and therefore no copy of summons or complaint was sent by mail to them or either of them. Neither was the residence of their mother known, and therefore no copy of summons or complaint could be mailed to her. There is no statement in the affidavit or pleadings as to the age of these minors. To sustain the proceedings of the court below, we must presume, until the contrary is made to appear, that these minors were over the age of 14 years, and in such case, the law required no service of summons or complaint on the mother, or other person, having them in charge. See Pr. Act. §§ 29, 30; Code Civil Proc. §§ 411, 412.

The transcript shows that an answer for these minors was filed by J. M. Seawell, Esq., then as now an attorney of this court, as their *guardian ad litem*, on the seventeenth day of February, 1871. This answer was verified by Mr. Seawell on the same day. It appears from the bill of exceptions that Mr. Seawell appeared with other counsel for defendants at the trial and took part in it. It is stated in the interlocutory decree that the gentleman above named was duly appointed *guardian ad litem* for the minors above named "upon proper application therefor, and due proceedings had for that purpose," and that he filed an answer as such guardian for them and each of them. That Mr. Seawell appeared and made defense for these infants, we do not think, admits of a doubt. For the reasons above given, we do not think that the questions as to the petition or order for the appointment of *guardian ad litem* are before us for consideration. The court had jurisdiction of the infants by service of summons, (see Code Civil Proc. 416,) and answers for them were filed by the guardians *ad litem*. As to the Moitozo infants, the answer is put in by their general guardian. The same is true of the Chambers infants and the Wood infants. The Dutra infants answered by W. H. Patterson, their *guardian ad litem*, and the Palmer infants by B. S. Brooks, their *guardian ad litem*. Upon the facts above stated, we do not see that on this appeal we can reverse the judgment or order of the court below, for the reason that the order of appointment does not appear in what in this case is properly the record. We think that we are justified in assuming that the parties, having been served and having answered by their general guardian or guardians *ad litem*, where the

record is silent, that the order of appointment, wherever required, was regularly made.

A further consideration here is worthy of notice in regard to the Warfield infants, where the answer was filed by an attorney and counselor of this court (Mr. Seawell) as the guardian *ad litem*. Without an order appointing him he would be guilty of contempt for misbehavior, and might be dealt with for it, and would probably be subject to a proceeding for removal or suspension from the discharge of his function as attorney. Code Civil Proc. § 1209, subs. 3, 6; section 282, subs. 2, 4; section 287, sub. 2. This we cannot presume.

A few remarks further on this point will explain the significance of the ruling here made. An absence of the order appointing a guardian *ad litem* in the case like the one before us, is a defect in the proceedings known as an irregularity. *Keaton v. Banks*, 10 Ired. Law, 381. Irregularity, as defined by Chitty, "is the technical term for every defect in practical proceedings or the mode of conducting an action or defense, as distinguished from defects in pleadings, which can only be objected to by demurrer or motion in arrest of judgment, or by writ of error." 3 Chit. Gen. Pr. 509. The learned author proceeds thus: "It is a comprehensive term, including all formal objections to *practical* proceedings, and is of three descriptions, viz.: *First*, such deviations as constitute a total nullity; *secondly*, such as are mere *irregularities*, and can only be objected to in a reasonable time, and subject to certain qualifications; and, *thirdly*, the non-observance of certain rules or enactments that have been deemed merely *directory*." 3 Chit. Gen. Pr. *ut supra*.

Under the English practice where there must appear in some shape in the record the fact of the appearance of an infant defendant by guardian *pro lite*; when no such matter appeared in the record, it was error, and the defect might be redressed by writ of error. If the appearance by guardian was recited in the count or plea, or appeared in the record, and in fact no such guardian had been appointed, it was that kind of error known as error in fact, which error is one which occurs where there is error in the process or proceeding not apparent on the record, and which must be shown to the court by affidavit or petition. See *Pickett v. Legerwood*, 7 Pet. 148; 2 Saund. 101a. Conceding that a writ of error might be brought in this state, still no such remedy is resorted to here. This remedy need not be further mentioned. In fact it appears that when such a writ does not exist, the same result may be reached by motion, the usual mode of correcting irregularities. It has been held that the motion is a substitute for such writ of error. See *Pickett v. Legerwood*, 7 Pet. 146. The same is said in 4 Minor, Inst. 856, as to the practice in Virginia.

The defect in this state is an irregularity, and may be redressed on motion. See *Whitwell v. Barbier*, 7 Cal. 54; *Shaw v. Gregoire*,

35 Mo. 342. On a motion to strike out the answer of the person appearing as guardian *ad litem* for want of authority, the court below can pass on the question. If denied, a bill of exceptions may be drawn up and filed. The question is thus placed on the record, and may be reviewed on appeal from the judgment. Or the question may be brought before this court by motion for a new trial under the first subdivision of section 657, Code Civil Proc., as an irregularity in the proceedings of the court, making the fact appear by affidavit, as required by section 658 Code Civil Proc. The question in either case is called to the attention of the court below, and if the order appointing such guardian was actually made, and not entered by default or misprision of the clerk, the court can have the proper entry *nunc pro tunc*, and thus the defect is cured. We will add here that it has been frequently held in New York, under a statute no less stringent on the subject than that of this state, that a judgment against infants, where no guardian *ad litem* had been appointed for them, was voidable and not void, (see *Croghan v. Livingston*, 17 N. Y. 218, and *McMurray v. McMurray*, 66 N. Y. 177,) and that the failure to appoint a guardian *ad litem* for an infant defendant was an irregularity which might be redressed on motion. *Keaton v. Banks*, *ut supra*. It will not be too late to move in regard to this matter of guardian *ad litem* when the case goes back to the court below.

The twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, and thirty-second findings are as follows:

"(27) That no assessment was made or tax levied for the fiscal year 1855-56, upon the property described as follows: 'The one undivided eighth part of the Rancho de San Pablo or 2,712½ acres thereof,' as against the said Antonio Castro or any other owner thereof, or person interested in the said San Pablo rancho, and which property is described in a deed dated August 26, 1856, made by one John F. S. Smith, then late sheriff, and as late sheriff of the county of Contra Costa, to Charles P. Pollard, recorded September 5, 1856, in the recorder's office of said county, in volume 5 of Deeds, page 215; that on August 10, 1856, the said Charles P. Pollard executed and delivered to Jacob M. Tewksbury an instrument purporting to convey to said Tewksbury all the right, title, and interest which he had in and to the land described in said instrument purporting to be a sheriff's deed, and that said instrument purporting to be a deed from said Pollard to said Tewksbury was recorded February 26, 1857, in volume 5 of Deeds, page 366, in the recorder's office of said county of Contra Costa.

"(28) That no tax assessment or tax levy was made for the fiscal year 1859-60 upon or against the lands purporting to be described as follows: 'The certain tract or lot of land situate in township number 1 of Contra Costa county, and numbered and designated on a map of survey of the San Pablo ranch, as made by Nicholas Gray, deputy

surveyor, in August, 1856, under an agreement of partition and release among the owners thereof, dated July 14, 1856, and made of record, together with the report of the commissioners therein named to make partition of said rancho, in the recorder's office of the said county, in volume 6 of Deeds, pages 1 to 20, inclusive, reference to which is made for full and perfect description of the same as follows, to-wit: All of lot numbered 49, except 25 acres of north corner, set off in said partition to Jesus Maria Castro; the remainder, being about 213 acres, valued at \$1 per acre, and for which a paper purporting to be a tax deed, dated October 5, 1860, was executed by James C. Hunsaker, sheriff of said Contra Costa county, to said Jacob M. Tewksbury.

"(29) That no tax assessment or tax levy was made for the fiscal year 1859-60 upon or against the lands purporting to be described, as follows: 'Twelve acres of land situated in township number 1 of Contra Costa county, and being the west end of lot number 132, of the ranch of San Pablo, as designated on a map of survey of the said ranch, made by N. Gray, United States deputy surveyor, in August, 1856, and made of record in volume 6 of deeds, pages 19 and 20, in the recorder's office of said county, to which reference is made, and also to a deed from J. M. Tewksbury to said party, for which see Index of Deeds in said office;' and for which a paper purporting to be a tax deed, dated October 6, 1860, recorded June 17, 1862, in volume 10 of Deeds, page 28, in said recorder's office, in and for Contra Costa county, was executed by James C. Hunsaker, sheriff of said Contra Costa county, to said Jacob M. Tewksbury.

"(30) That no tax assessment or tax levy was made for the fiscal year 1859-60 upon or against the lands purporting to be described, as follows: 'Lot number 54 of the partition of the San Pablo ranch, containing 48 acres; for particulars of description, see map of survey of said partition, as made by Gray, Forbes, and Cooper, commissioners appointed to divide the said ranch among the heirs and owners thereof, in the year 1856, all of which is of record in Book of Deeds, number 6, of Contra Costa county records, pages 1 to 20, inclusive, reference to which is made; said land being in township number 1, of said county;' and for which a paper purporting to be a tax deed, acknowledged December 6, 1860, recorded December 8, 1860, in the office of the recorder of Contra Costa county, in volume 8 of Deeds, page 383, was executed by James C. Hunsaker, sheriff of said Contra Costa county, to said James M. Tewksbury.

"(31) That no tax, assessment, or tax levy was made for the fiscal or the revenue years 1860-61, upon or against the lands purporting to be described as follows: '48 acres of land lying in the county of Contra Costa, township number 1, being a part of the San Pablo rancho, known and designated as lot number 54, of the survey of said rancho and map thereof, made by N. Gray, United States deputy surveyor, under an agreement of partition and distribution of said

rancho, in 1856, which map and report and deed is of record in the recorder's office of Contra Costa county, in volume 6 of Deeds, pages 1 to 20, inclusive, reference being thereunto made for particular description;' and for which a paper purporting to be a tax deed, dated December 9, 1862, recorded December 9, 1862, in the office of the county recorder of Contra Costa county, in volume 10 of Deeds, page 309, was executed by John J. McKewen, sheriff and tax collector of said Contra Costa county, to said Jacob M. Tewksbury.

"That the justice's court purporting to have rendered the judgment recited in said last-mentioned tax deed, had no jurisdiction or authority to render the judgment therein recited against any person or property.

"(32) That no tax assessment or tax levy for taxes for the fiscal or revenue year recited in a paper purporting to be a tax deed, bearing date December 13, 1862, and recorded December 13, 1862, in the office of the recorder of Contra Costa county, in volume 10 of Deeds, page 325, was made upon or against the property purporting to be described as follows: 'All the south-west fractions of the north-east quarter of section number twenty-four, and the north-east fraction of the north-west quarter of section number twenty-four, and the south fraction of the east half of the south-west quarter of section number thirteen, in township number 1 north, range number 5 west, meridian of Mount Diablo, the same being swamp or overflowed land, and the same piece surveyed by J. B. Abbott, county surveyor, for Joseph H. Brennehan, as appears by the receipt of Hiram Fogg, county treasurer of Contra Costa county, recorded in volume 1 of Tule Land Records, in county recorder's office, pages 132 and 133, containing 133 57-100 acres, and also about 12 acres of land of the Embarcadero, near San Pablo, county of Contra Costa, known as Davis' Landing, reference for a more perfect description being had to a deed of record in the recorder's office, county aforesaid,' and for which the paper purporting to be a tax deed above referred to was executed by John J. McEwen, sheriff of Contra Costa county, to said Jacob M. Tewksbury, as against any person or persons mentioned in said last-mentioned deed.

"That the justices' court purporting to have rendered the judgment recited in said last-mentioned deed had no jurisdiction or authority to render the judgment therein recited against any person or property."

The findings just above quoted as to the various assessments mentioned in them are not in accordance with the law. The statute requires of the court, in giving the decision, to state separately the facts found and the conclusions of law. We interpret this to require of the court to find the facts specially, unmixed with the law, so that the judicial mind may see that the conclusion of law is a deduction of the law from the facts, the unmixed and ultimate facts found. Such as we understand to have been the ruling of the court in *Breeze*

v. Doyle, 19 Cal. 101. In this case the test of the sufficiency of a finding is given in these words, "Would they answer if presented by a jury in the form of a special verdict?"—and, further, the special verdict "must present the facts so distinctly as to refer the court clearly to the questions of law arising on them." We are not aware that this case has ever been overruled. It is cited as authority in *Lucas v. San Francisco*, 28 Cal. 596, and *Pralus v. Pacific G. & S. M. Co.* 35 Cal. 35. Blackstone says such verdict must *present the naked facts*. 3 Bl. Comm. 377. Now, tested by the rule above stated, would such a finding be sufficient? In finding a special verdict, a jury must find the facts, leaving the law to be pronounced by the court on the facts so found. A jury was originally permitted to find a special verdict, so as to escape the responsibility, and avoid the danger of having their verdict attainted. *Id.* This responsibility was a very serious matter, the penalties on conviction being very severe. *Id.* 403-405. Such verdicts (special) arose on *St. West*, 2; 13 *Edw. I. c.* 30, p. 2; *Boote's Suit at Law*, 176, and note 3 on same page; 3 Bl. Comm. 377. As an instance, for illustration: The issue whether there was an assessment of a particular piece of property for taxes for a year designated is left to a jury to find a special verdict; or, in other words, to find the facts specially as to such assessment, so that the court may pronounce the judgment of the law upon the facts so found. The jury render a verdict in this form: "We find that there was no assessment for taxes for the year mentioned." What facts are specially found in such a verdict upon which the court can pronounce, as matter of law, whether there was an assessment or not? Clearly none. No facts are presented to which the judicial mind can be applied. The jury has found that there was no assessment, and has referred nothing to the court to act on. In fact, the jury has found by such a verdict fact and law both, which is a general, and not a special, verdict. *Boote's Suit at Law*,—definition of general and special verdicts,—176.

It must be remembered that an assessment is made up of several constituents. In the first place there must be the name of the person to whom the property is to be assessed. *Pol. Code*, 3650. This person must usually be the owner if known to the assessor, and if not known it may be assessed to unknown owners. *Id.* 3636. (2) There must be a list or description of the property. *Id.* 3650. (3) The cash value of the property listed or described. *Id.* Such are the material factors of an assignment, and they must appear on the assessment roll or book. *Id.* Further, the valuation must be made by the proper officer authorized by law. Reference is herein made to the Political Code, but such were the elements of an assessment before the Code, and in fact during the entire history of the state. The jury now in finding the facts specially, where the issue presented is whether there was an assessment or not, may find in the very words what appears on the assignment roll or book, or man-

find that no owner, known or unknown, of the property was inserted in the roll or book, or that there was, or the property was or was not described, or that a valuation or no valuation was made, as the evidence may show.

If either of the factors above mentioned is lacking, in judgment of law, there is no assessment; or if it is found that the valuation was made by a person not authorized by law, there can be no valid assessment. So when the verdict finds *in hæc verba* the entries in the roll or book, or finds with regard to each element as above, the court can readily determine the judgment that the law pronounces on such facts. If any one factor or element required is wanting, there is no assessment; if all are present, there is an assessment. In this mode the object of the law is attained—which is to have the facts on which the issue depends found distinctly and clearly so as to refer the court clearly to the questions of law arising on them. The finding as to the assessments in this case is not of the character required. It finds no fact on which a question of law can arise. The court, in looking at the finding, sees nothing but that there was no assessment. This being so, there is nothing to be determined, and the inquiry is ended.

The thirty-second finding is defective in finding no facts at all. It is stated in this finding that there was no tax assessment or tax levy upon or against certain property (describing it) in a fiscal year mentioned in a certain deed bearing date December 13, 1862, and recorded same day in the office of the recorder of Contra Costa county, but the contents of the deed are not found in any way, either by finding the deed *in hæc verba*, or by finding its substance. Whether, therefore, there was or was not any tax assessment or tax levy for any fiscal year, cannot in any way be perceived by the court, and hence no conclusion of law can be pronounced on the finding. Neither is the court informed what fiscal year is referred to. Reference is made to a deed, which may be inferred to be evidence of the fiscal year alluded to. If the evidence were found, it would not be sufficient; the law requires the facts, and not the evidence of them, to be found. It is found, also, in the same findings that no tax levy was made for the fiscal years mentioned in them. If the words "tax levy" were used as synonymous with assessment, then what has been said above disposes of the question in relation to such levy. Levying a tax usually means the fixing of the rate at which property is to be taxed, and this is usually done by the legislature, either mediately or immediately; that is to say, by the legislature for the purpose of state taxation, and by the local governing bodies, such as boards of supervisors, etc., for local taxation, to which bodies the power of levying the tax is delegated by the legislature. During the years mentioned in the above findings such was the mode of levying which prevailed in this state. See St. 1854, p. 88; St. 1857, p. 325; St. 1858, p. 31; St. 1860, p. 365, for revenue acts of years mentioned. We cannot conclude that the court below intended by the findings under

consideration to declare that the legislature and the various local bodies to which this duty of levying the tax pertained, did not perform it. If it did so intend a reference to the acts of the legislature, and of the local bodies referred to, would show that this was not true.

At the end of findings 31 and 32 are findings in regard to certain judgments rendered by justices' courts in suits for taxes, to the effect that the courts referred to had no jurisdiction or authority to render such judgments against any person or property. The jurisdiction over the subject-matter, where the amount of taxes sued for did not exceed \$200, was vested in justices' courts by the act of April 3, 1861. See first, second, fourth, and fifth sections of the act; St. 1861, pp. 119, 120. If such courts did not have jurisdiction of the person, by reason of the fact that there was no service of process to bring such person into court to make answer in the action, that fact should have been specially found. The court cannot know such to be the case, under a finding expressed in the general language of the finding referred to. The findings as to these judgments refer to them as the judgments recited in the tax deeds mentioned in the findings. The tax deeds are not found *in hæc verba*, nor are the recitals; but if we are at liberty to examine them it will be seen that the judgments recited in them were rendered in March, 1862, at which date, under the constitution of 1849, the jurisdiction of the district courts did not embrace cases in equity where the amount in dispute was under \$200. We are of opinion that the justice's court had jurisdiction in suits for taxes where the amounts sued for were less than \$200, under the act above mentioned. If the amounts sued for exceeded \$200, then such court did not have jurisdiction. But we cannot know whether this is so or not, unless such is shown to be the fact by a finding to that effect. The findings in regard to these judgments are insufficient in not presenting the facts so found that this court can say whether the justice's court had or had not jurisdiction. See on this point *Suydam v. Williamson*, 20 How. (U. S.) 427; *Birkhead v. Brown*, 5 Hill, 634, opinion by Bronson, J.; *Miller v. Shackelford*, 4 Dana, 261; 4 Minor, Inst. 752. Upon these issues, these as to the assessments for taxes and the jurisdiction of the justices' courts to render the judgments aforesaid, on which findings were not waived, there are really no findings.

In regard to the assessment and levy of taxes for the county of Contra Costa for the years mentioned in the findings above quoted, we refer further to the fact that the assessment of taxes upon all property real and personal for the county aforesaid, for the fiscal years ending respectively on the first of March, 1860, and on the first of March, 1861, were legalized by the act of eighth of April, 1861. See St. 1861, p. 119.

It is said that the allegations of the answer of defendant Jacob M. Tewksbury, as to the deed of Gabriela Castro to Martina Castro de Alvarado, are not negatived by the findings, and are therefore to be

taken as true. On this point we are referred to certain portions of the answer, which we have examined. The portions referred to are paragraphs 15 to 18, both inclusive, of the amended answer of the defendant Tewksbury. We think the material allegations are disposed of by the findings. The material allegations in the answer are that the document referred to was not under seal when signed or delivered or acknowledged, but that a seal was placed on it afterwards by some person unknown to the defendant, "without any authority from said Gabriela," and further that at the time it is claimed she executed this instrument, she was not of sufficient mental capacity to enter into such contract as indicated by the paper; that she was not competent to execute a deed. Whatever other allegations appear in the portions of the answer referred to, are allegations of evidence or conclusions of law, as to which no findings are by law required. The material allegations above mentioned are in our judgment disposed of by the eighth and twenty-third findings. The matters found in the eighth finding substantially find that the instrument of conveyance referred to in it, and in the answer of Tewksbury above mentioned, was sealed on the fourth of August, 1851, when it was executed. The issue made by the allegations as to the mental capacity of Gabriella de Castro is clearly passed upon in the twenty-third finding.

It is argued that the adverse possession of the appellants is a bar to the partition. Conceding this to be so, for the purpose of the argument, the court finds that there was never any adverse possession (see sixteenth finding) by any one of the defendants, and as a conclusion of law that there was never any ouster (see eighth conclusion of law.) But it is said that the evidence is insufficient to sustain such finding. In answer to this it may be said that the statute of limitations did not commence running in this case until the final approval of the survey by the proper district court of the United States. *Morris v. De Celis*, 51 Cal. 55. The survey was not finally approved until the seventeenth of August, 1864, and this action was commenced on the nineteenth of November, 1867. If we are in error in holding that the statute of limitations did not commence running at the time just above mentioned, then it could not have begun to run until the issuance of the patent, (*Gardiner v. Miller*, 47 Cal. 570; *Same v. Schaelzie*, Id. 588; *McManus v. O'Sullivan*, 48 Cal. 17; *Hagar v. Spect*, Id. 408; *Galindo v. Wittenmeyer*, 49 Cal. 12; *Hoadley v. San Francisco*, 50 Cal. 273; *Reed v. Ybarra*, Id. 465; *De Miranda v. Toomey*, 51 Cal. 165,) and the patent was not issued until after the action was begun. Such being the case, it is unnecessary to consider the question of the insufficiency of the evidence to sustain the finding as to the character of the possession, whether adverse or not.

The decree in this case is made under section 760, Code Civil Proc., which is in these words: "Whenever from any cause it is, in the opinion of the court, impracticable or highly inconvenient to make a

complete partition, in the first instance, among all the parties in interest, the court may first ascertain and determine the shares or interests respectively held by the original co-tenants, and thereupon adjudge and cause a partition to be made, as if such original co-tenants were the parties and sole parties in interest, and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted, as between those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof, as they may desire."

Under this section, before any interlocutory decree for a partition is made, the rights of the parties must be ascertained by the court. The different sections of a chapter in any one of the Codes must be so construed as to reconcile all apparent conflicts, and if there are conflicting provisions in the different sections of a chapter the provision of the section last in numerical order must prevail, unless such construction is inconsistent with the meaning of such chapter. Such is the direction in our judgment of section 4484 of the Political Code. Construing the sections 759, 763, and 764 together, it is evident that the rights of all the parties to the action must be ascertained and determined by the court before any partition can be ordered. Is there a different rule laid down in section 760? We think not. That section, in our judgment, does not dispense with ascertaining the rights of all the parties, but allows the further or additional ascertainment of the shares or interest respectively of each of the original co-tenants, and then adjudging a partition in the first instance of the land between the original co-tenants as if they were the only parties. To make such a partition so that it may be of any aid in making the further partition between all the parties to the action, it must be made to include in the land allotted to each co-tenant the possession and improvement of each one claiming under him. To enable the referees to do this, (for they cannot do it themselves,) the court must ascertain the right and title of each party, showing under which of the co-tenants such party claims. The interlocutory decree must be made before there can be any partition ordered; that is, the rights of the parties determined by the court, and specified in such decree. Such, we think, is the meaning of section 760. An interlocutory decree must be made ascertaining and declaring the rights of all the parties. The court can, in addition to ascertaining the rights and title just mentioned, and specifying them in the decree, ascertain the rights and interests of the original co-tenants, and specify them also in the decree; indeed, this last mentioned may be done first, and then after ascertaining the titles of the original co-tenants, and all the parties, and declaring them in the decree, the court may thereupon adjudge and cause a partition to be made as of the original co-tenants.

The proper construction of section 760 in our judgment is, under

the conditions mentioned in it, to first ascertain and determine the shares or interest respectively held by the original co-tenants, as well as the shares or interest respectively held by each one of the parties to the action, and upon such ascertainment being made and a judgment rendered in accordance therewith, thereupon to adjudge and cause a partition to be made as if such original co-tenants were the sole parties in interest. We understand the foregoing provision as forbidding any partition until an interlocutory decree is made. The statute does not allow but one interlocutory decree; therefore we say that the interests of such party to the action must be ascertained and determined before any interlocutory decree is made. If this is not so, there must be two interlocutory decrees, and we find no warrant for this in the statute. This section is intended to allow, and does allow, two partitions, one as between the original co-tenants, and then another between all the parties to the action. After this first partition is made, which is allowed as an aid to accomplish the second one, the court is authorized to proceed "in like manner to adjudge and make partition separately of each share or portion so ascertained and settled as between those claiming under the original tenant to whom the same shall have been so set apart." The language just above used is to adjudge and make partition; as to the first partition the language used is "to adjudge and cause a partition to be made." The words as to ordering partition are substantially the same in each case, the only difference being between the words that follow "adjudge and," as to the first partition, "adjudge and cause a partition to be made," and as to the second partition "adjudge and make partition." Thus two partitions are only allowed, one preliminary and ancillary to the other, partial in its character; the other complete and embracing all parties to the action. Though there are two partitions, there is but one interlocutory decree. This being the case, the interlocutory decree should embrace all the rights to be ascertained and determined, those of the original co-tenants and also of all the parties to the action. These rights so ascertained should be set out clearly in the decree; and the interlocutory decree or judgment is not complete until this is done. The judgment in this case is not so made, and hence there is no complete interlocutory judgment.

A further reason is suggested to us as sustaining the view that there is but one interlocutory judgment, which is to be found in section 939, Code Civil Proc., regulating appeals. It allows "an appeal from an interlocutory judgment in actions for partition of real property," and from interlocutory judgments in such actions. We think it clear that the statute did not intent to allow more than one appeal from the interlocutory judgment in partition. It was not intended that parties to such actions should be put to the trouble and expense of several appeals from a judgment of this character. It may be that the interlocutory judgment may, in form, be divided into two parts, one part directing a partition as to the original co-tenants, as above

indicated, and the other part directing a partition between all the parties; but when this is the case, the two parts constitute the interlocutory decree or judgment. That there is but one such judgment is borne out by all the provisions of the chapter of the Code of Civil Procedure in relation to partition. We refer particularly to sections 759, 761, 762, 763, 764, and 765, Code Civil Proc.

The interlocutory decree herein adjudges that the partition of the ranch San Pablo shall be made, in the first instance, in accordance with the provisions of section 760 Code Civil Proc., as among the original co-tenants, and according to the shares and interests, as ascertained and determined in the decree to have been originally held by them respectively, and as if they were the sole parties to the action, and that thereafter, upon due proceedings for that purpose to be instituted and taken, partition shall in like manner be adjudged and made separately of each share or portion so ascertained and allotted as between those claiming under the original co-tenants, to whom the same shall have been so set apart, or that they may be allowed to remain tenants in common thereof, as they may desire. The decree then proceeds to declare who are the original co-tenants among whom partition in the first instance shall be made, and the shares and interests of each of such co-tenants, as follows: Martina Castro de Alvarado, fifteen equal twenty-second parts of said rancho; Antonio Castro, Joaquin Y. Castro, Juan Jose Castro, Gabriel V. Castro, Victor Castro, and Jesus Maria Castro, each one equal twenty-second part of same; Louisa Moraga de Briones, Maria de los Angeles Moraga de Briones, Jose Moraga, Guadalupe Moraga de Martinez, Francisco Moraga, each one equal one-fifth part of one equal one-twenty-second part of same.

The decree then proceeds to appoint referees to make the partition, divide and allot the several portions of the rancho to the original co-tenants, as aforesaid, giving to each share and interest its due proportion of land, quality and quantity relatively considered, and directs the referees that, after excepting the ways, roads, and streets, afterwards referred to in the decree, to divide and allot to the original co-tenants as follows: (1) A portion of said rancho, equivalent to fifteen twenty-second parts thereof, quality and quantity relatively considered, and, in as far as practicable, without prejudice to any other interests, including the so-called "Alvarado homestead," and the improvements and possessions of persons claiming under said Martina Castro de Alvarado, to be allotted and set aside by the referees, to be known as the "Martina Castro de Alvarado share and interest, which will thereafter, (as the decree proceeds,) "upon due proceedings had in accordance with law, be separately partitioned between those persons claiming under said Martina Castro de Alvarado, according to their respective rights."

A like direction, *mutatis mutandis*, is given to the referees with regard to the shares above indicated of each of the original co-tenants

above mentioned, giving a name or title to each share, adopting for that purpose, as in the one just above stated, the name of the original co-tenant to whom the portion is to be allotted,—for instance, the “Antonio Castro share and interest,” the “Joaquin Y. Castro share and interest,” the “Louisa de Moraga share and interest,” etc. It is then directed that the improvements and possessions of persons claiming under the co-tenants aforesaid are, as far as practicable, without prejudice to any other interest, to be included “in said respective shares and interests so to be allotted, segregated, and set aside” in manner following: The “Martina Castro de Alvarado share and interest” is to include all the improvements upon the tracts of land known upon Gray’s map of the rancho San Pablo, filed for record in the recorder’s office of said Contra Costa county on August 28, 1857, as lots 58, 170, 131, south 99 acres of 55, 79, 80, 105, east half of 31, west 40 acres of 172.46, part of 81 north of road and 51, and 6 acres of 112 north-east of county road.

Like directions are given, *mutatis mutandis*, as to the other shares and interests, directing location by reference to Gray’s map, and in one instance, that of the Juan Jose Castro share and interest, reference is made to a tract of land (to be included in said share) of 140 acres, “now in the possession of H. A. Benson, and including his improvements, described in a certain deed from John H. Saunders and H. P. Hepburn to said Benson, dated January 28, 1857, recorded in the county recorder’s office of said Contra Costa county on January 29, 1857, in volume 5 of Deeds, page 327.” A direction is then made that the improvements heretofore specially referred to, to be embraced in the respective shares if the same can be done without prejudice to the other shares, are to be included without placing any value on them, and a direction is then given in accordance with the statute (Code Civil Proc. 764) as to setting apart portions of the rancho for ways, roads and streets. Further directions are made to the referees to proceed without delay to divide the rancho and allot the several portions thereof to the said original co-tenants, designating each of such portions by proper land-marks, with authority to employ a surveyor mentioned, with the necessary assistants to aid him, that the allotments to each share may be in one or more parcels, as may be most convenient “and in accordance with the reservations, improvements, and interests hereinabove provided for,” that the referees make a written report to the court of their proceedings, etc. The decree concludes with a description by metes and bounds of the rancho San Pablo, taken from the patent of the United States above referred to, and a declaration is added to this description, that by the grant, decree, and survey, the south boundary of the San Pablo ranch is identical with the north line of the “rancho San Antonio,” or “Peralta ranch.”

A summary of this decree is given, as some important questions arise thereon which are to be considered and determined. The

statute in reference to partition (see Code Civil Proc. §§ 752, 753 *et seq.*) declares that the rights of the several parties, plaintiff and defendant, may be put in issue, tried, and determined in the action; and when a sale of the premises is necessary (to effect a partition) the title must be ascertained by proof to the satisfaction of the court before the judgment of sale can be made. *Id.* § 759. By section 763, Code Civil Proc., it is provided that if it be alleged in the complaint, and established by evidence, or if it appears by the evidence, without such allegation in the complaint, to the satisfaction of the court, that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof. Otherwise, upon the requisite proofs being made, it must order a partition, according to the respective rights of the parties, as ascertained by the court, and appoint three referees therefor, and must designate the portion to remain undivided for the owners whose interests remain unknown, or are not ascertained. It is enacted by the section next ensuing (764) that in making partition the referees must divide the property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered, *according to the respective rights of the parties* as determined by the court, pursuant to the provisions of this chapter, designating the several portions by proper land-marks, etc. Various other directions are given in this section as to the duties of the referees, which need not be here detailed. The referees are required to make a report of their proceedings, specifying therein the manner in which they have executed their trust, and describing the property divided and the shares allotted to each party, with a particular description of each share. *Id.* § 765. The court may confirm, change, modify, or set aside the report, and if necessary appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever. *Id.* § 766.

In the system of partition devised by statute in this state, as in the common-law action of partition, and the proceeding for that purpose in a court of chancery, there were two judgments, an intermediate or interlocutory, and a final judgment. Mr. Freeman, in his work on Co-tenancy and Partition, (section 516,) styles the interlocutory judgment *the first judgment*. He has accurately stated the proceedings, (see sections 516, 517 *et seq.*) both in law and equity. According to his statement, whether the proceeding was at law or in equity, it was first necessary to decide whether the parties were co-tenants and entitled to partition. This question being resolved in the affirmative, it was next necessary to determine *the respective moieties* of each of the parties. "The result of the decision of these two questions was the judgment *quod partitio fiat*." This was the first, or interlocutory, judgment in partition. It directed that partition be made between the parties, and commanded the sheriff to go to the premises, and, in the presence of the parties, if they be willing to be

present, after being first forewarned, 'by the oath of good and lawful men of his county, respect being had to the true value of the said tenements, with the appurtenances, he cause to be divided' into certain moieties, which the judgment proceeded to specify, and that he deliver one moiety to A. and another to B., etc. In chancery the decree for petition ordered—*First*, that a partition be made between the plaintiffs and defendants, in certain moieties, which it specified; *second*, that a commission or commissions issue to certain persons, to be therein named; *third*, that the commissioners do make a partition, [here specifying the manner in which it shall be made;] *fourth*, that all writings, surveys, muniments of title, etc., be produced before the commissioners; *fifth*, that the commissioners examine witnesses as they may think fit; *sixth*, that after such partition has been made that the parties execute conveyances to each other, respectively. The decree, in addition to these directions, usually contained another in reference to the title deeds, and one in regard to costs."

The learned writer cites as authority for the above statements 3 Chit. Pl. 1392; Booth, Real Act. 244, 245; Seton, Forms, 184; Daniell, Ch. Pr. (4th Ed.) 2254.

But "whether the proceeding was at law or in equity, the province of the court was to determine between whom, and in what proportions, the division should be made. In no case could the commission determine title or prosecute any inquiry in regard thereto." Freem. Part. § 517, citing *Ham v. Ham*, 39 Me. 218; *Agar v. Fairfax*, 17 Ves. Jr. 542; *Phelps v. Green*, 3 Johns. Ch. 304; *Ledbetter v. Gash*, 8 Ired. Law, 463. See, also, *Calmady v. Calmady*, 2 Ves. Jr. 568.

It will be observed that in the proceeding at law the *moieties* are specified in the interlocutory judgment. In *Agar v. Fairfax*, *supra*, the master of the rolls (Sir WILLIAM GRANT) said that the writ of partition always stated the proportions in which the partition was to be made. This was the writ which issued on the first judgment, and is called the writ *de partitione facienda*. See 3 Chit. Pl. 1394, 1401. The entire record in an action for partition at law may be found in 3 Chit. Pl. 1396 *et seq.* By an examination of the references just above given the form of the writ *de partitione* may be seen, in which it will be observed that the moieties in which the land is to be divided are distinctly specified. The moieties are also specified in the decree in the proceeding in chancery and the commission issued thereon.

This was the very point in judgment in *Agar v. Fairfax*, *supra*. In that case the master of the rolls said: "It seems to me to have been soundly objected that it is impossible in the present situation to issue a commission; as then it must be referred to the commissioners, first, to ascertain their interests, and the proportions in which they are entitled," (referring here to the interests and proportions of the cotenants,) "and then to make the allotment. The former was never

done by commissioners. The court is to ascertain the proportions and rights of the parties; and when that is done, then the duty of the commissioners begins,—to make the division in those ascertained proportions.” 17 Ves. Jr. 543.

The master of the rolls directed a reference to the master to ascertain the estates and interests of the parties and report to the court. On a petition for an appeal this order was in substance affirmed by Lord Chancellor ELDON, following *Calmady v. Calmady*, *supra*. In this case the Lord Chancellor said: “This court issues the commission, not under the authority of any act of parliament, but on account of the extreme difficulty attending the process of partition at law; where the plaintiff must prove his title as he declares; and also the titles of the defendants; and judgment is given for partition according to the respective titles so proved. That is attended with so much difficulty that by analogy to the jurisdiction of a court of equity in the case of dower, a partition may be obtained by bill. The plaintiff must, however, state upon the record his own title and the titles of the defendants; and with a view to enable the plaintiff to obtain a judgment for partition, the court will direct inquiries to ascertain who are, together with him, entitled to the whole subject. If, therefore the state of the record, as originally framed, is not such as to authorize the court to say that the plaintiff and the defendants are respectively entitled in distinct shares, comprehending the whole subject, the proper course is to direct a reference to the master, to ascertain what are the estates and interests of the plaintiff and the defendants respectively, and if it appears that they or some of them are entitled to the whole, then to order a partition according to the rights of all or such of them as appear entitled, dismissing the bill as against those who do not appear to have any right. The decree in *Calmady v. Calmady* is perfectly regular directing the inquiry, and afterwards a commission to issue, to divide the estate among the several parties who appear upon the master’s report entitled to it.” 17 Ves. Jr. 552, 553.

It thus appears clearly that the moieties in which the partition is to be made are specified in the first judgment, and the writ *de partitione facienda* issued thereon in the action at law, and in the first judgment and the commission issued thereon in the suit in chancery, and that in neither case are the shares or interests of the parties or any matter of title to be determined by the sheriff in the one case or the commissioners in the other. We think this is clearly the case under our system, from the provisions above cited from the Code of Civil Procedure, viz., that before any partition is ordered or can be made, the interests and shares of the parties are to be determined and adjudged by the court, (see *De Uprey v. De Uprey*, 27 Cal. 337; *Lorenz v. Jacobs*, 53 Cal. 24,) and the moieties in which the land is to be partitioned; and such moieties must be specified in the interlocutory judgment, so that the referees may have no question of title to deter-

mine, and that they may intelligently discharge the duties as to making the allotments devolved on them by the decree. The provisions referred to are in sections 759, 763, 764, Code Civil Proc. In no case should a question of title be left to the referees.

In the decree herein this rule is not observed. The referees have to determine questions of title in order to execute the decree. As stated above, the referees are directed, in making the partition ordered by the judgment, to include in the respective shares and interests indicated in the judgment, "the improvements and possessions of persons claiming under the co-tenants aforesaid, as far as practicable, without prejudice to any other interest." The referees will be compelled to determine who the persons are who claim under the respective original co-tenants, or they cannot execute the directions of the judgment. The judgment is their only authority to act at all, which will be in their hands in the shape of a certified copy. This reference of a title to be determined by them is irregular, contrary to the statute, and a duty is thus imposed on them by the court which it has no right to impose. Under the general laws of the land, and the enactments of the statute, the parties have a right to have all such questions determined by the court. And the court has not the power, without the consent of the parties, to delegate such power to another tribunal, officer, or person. In some instances in this cause more than one party is claiming the same interest, and the party out of possession may claim that the party in possession is holding for him. How can the directions of the judgment be executed without determining these questions? These are questions of title, and may be difficult of determination. Must not the court determine them? It appears to us that this is clearly the duty of the court, conferred on it by the law of the land, which it cannot put away or evade. The court should determine who the parties are who claim under the respective co-tenants, whose improvements and possessions are to be included in the particular share or interest, specifying such persons and their possessions in the decree or judgment, so that the referees may be clearly informed as to their duties, which are mainly, if not entirely, ministerial. They can then execute the directions of the decree, without having to determine any questions of law in reference to title of any of the parties.

The pointed language of the master of the rolls and of the lord chancellor in *Agar v. Fairfax*, *supra*, on this subject, in relation to the writ of partition, and to the commission issued in the chancery suit for partition, is worthy of observation in this connection. See, also, *Ham v. Ham*, 39 Me. 218; 1 Story, Eq. (Redf. Ed.) § 650, and note 1, § 651. The proceeding in this state very much resembles the suit by bill,—in fact, is almost identical with it. In *Gates v. Salmon*, 35 Cal. 593, which was a case for a partition, it is said by RHODES, J., speaking for the court, of the action for partition in this state, that "the action, though regulated to a great extent by the

statute, partakes more fully, both in respect to the remedies provided and the mode of procedure, of the principles and rules of equity than those of law;" and further in the same case (page 596) remarked "that the main features of the action, as prescribed by the statute, closely resemble those of a suit in equity brought for the same purpose."

Ham v. Ham, cited from Maine, was a case of partition under the statute of that state. As to the ascertainment of title it appears to be substantially the same as that of this state. See Rev. St. Me. 1857, c. 88, tit. 9, pp. 557, 558, where the provisions referred to in the opinion appear. The same is true in New York, viz., that the titles must be ascertained by the court. See 5 Wait, Pr. 87, etc., and pp. 91, 93, where the forms of the interlocutory judgments are given. See, also, page 95, etc.; 3 Wait, Pr. 346, 347.

In section 764 the following provisions were made: "Before making partition or sale, the referees may, whenever it will be for the advantage of those interested, set apart a portion of the property for a way, road, or street, and the portion so set apart shall not be assigned to any of the parties, or sold, but shall remain an open and public way, road, or street, unless the referees shall set the same apart as a private way for the use of the parties interested, or some of them, their heirs and assigns, in which case it shall remain such private way. Whenever the referees have laid out, on any tract of land, roads sufficient, in the judgment of said referees, to accommodate the public and private wants, they shall report that fact to the court, and upon the confirmation of their report all other roads on said tract shall cease to be public highways. Whenever it shall appear, in an action for partition of lands, that one or more of the tenants in common, being the owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds out of the common land, and executed to the purchaser a deed of conveyance, purporting to convey the whole title of such specific tract to the purchaser in fee and in severalty, the land described in such deed shall be allotted and set apart in partition to such purchaser, his heirs or assigns, or in such other manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract or tracts of land can be so allotted or set apart without material injury of the rights and interests of the other co-tenants who may not have joined in such conveyance: provided, that in all cases the court shall direct the referees, in making partition of land, to allot the share of each of the parties owning an interest in the whole or in any part of the premises sought to be partitioned, and to locate the share of each co-tenant so as to embrace as far as practicable the improvements made by such co-tenant upon the property, and the value of the improvements made by the tenants in common must be excluded from the valuation in making allotments, and the land must be valued without regard to such improvement, in

case the same can be done without material injury to the rights and interests of the other tenants in common owning such land."

These provisions are usually inserted in the interlocutory decree in partition. We cannot see how these provisions can be carried out by the referees, unless the interest of each party is ascertained by the court and stated specifically in the decree. And when the decree for a partition is made, as it is in this case, the court must determine under which of the original co-tenants each party claims, and state it in the decree, so that the referees can perceive clearly and be enabled to execute the provisions in section 764, when inserted in the decree. The judgment herein should be modified in this regard; that is to say, the judgment should be so modified as to specify in it the parties who claim respectively under the original tenant, and set forth the possessions of such parties as are to be included in the share allotted to such original tenant.

We think it proper to call the attention of court and counsel to the fact that there is a map referred to in the judgment as "Gray's Map," as recorded in a certain office. Where a map or other paper is referred to in the judgment as a material part of it, it should be identified by the judgment and made a part of it. It should not be referred to as a paper recorded elsewhere. A contention might arise on the identity of the paper before the referees when they come to act, and therefore the document should be identified by the court, and this should appear in the judgment. See *Crosby v. Dowd*, 61 Cal. 557.

If, by reason of any acts of the parties to the alleged partition of 1856, any equities have grown up in favor of any of the parties to this action, or of those under whom they claim, against any of the parties to it, affecting their interests in the land to be partitioned, we cannot see any good reason why they should not be enforced and adjudicated herein, and be allowed their proper effect in the final decree of the partition to be rendered in the action. Under the chapter (6, tit. 10, pt. 2) of the Code of Civil Procedure touching actions for the partition of real property, all equities arising between the parties, whether plaintiffs or defendants, concerning the land to be partitioned, can be determined. This relates to all equities, if any there are, whether arising under the so-called partition deed of 1856 or otherwise, not already passed on in the court below. The court below can yet pass on them in the further progress of the cause, can make such findings on the issues not yet found on as may be proper, and allow them their just legal effect in its judgment. If it is requisite to find on any issue made by the allegations of any answer, which allegations, it is argued, are in support of the alleged partition of 1856, it can yet be done when the cause goes back to the court *a quo*; but we cannot see that any of these allegations, or the issues arising on them, are material, in the view taken of the instrument of 1856 by the court below and this court, viz., that it is no partition at all.

An appeal was taken from the order in this cause appointing a receiver. 2, no. 3—31

ceiver, and we are asked to review it. We are met with the contention on behalf of respondents that the order above mentioned is not appealable in its character. This order was made on the eighteenth of November, 1878, after the rendition of the interlocutory decree, which was on the fifteenth of July, 1878. On the question whether such order is appealable or not, we are referred to many decided cases by counsel for the respective parties.

The *French Bank Case*, 53 Cal. 550, was an application for a writ of *certiorari* to review an order in the case appointing a receiver. In passing upon the point discussed, whether the case made was one for the writ of *certiorari*, the court said: "The statute concerning this writ (section 1068) provides that it may be resorted to 'when * * * there is no appeal,' etc. If there be an appeal, the writ of *certiorari* cannot be awarded; but no direct appeal is given by the statute, and we are of opinion that such an order is not subject to be reviewed on an appeal from the judgment under section 956 of the Code of Civil Procedure."

In the case under discussion, as we have stated above, the order for the receiver was made after the interlocutory judgment. In the case cited the order was made *ex parte* at the time of the filing of the complaint. No final judgment has been entered in this case, and therefore the appeal cannot be sustained as one taken from a special order made after final judgment.

In *Whitney v. Buckman*, 26 Cal. 448, which was an action of ejectment, after a verdict and judgment for plaintiff, a receiver was appointed. Subsequently an order was made that the receiver pay over the money in his hands to the prevailing party, and from this order an appeal was taken. The court held that the order appointing the receiver, which was not appealed from, could not be reviewed on the appeal which was taken from the subsequent order. It may be that an appeal could have been taken from the order of appointment, as a special order made after final judgment; and such, it may be, was the view of the court in the case cited, though it is not said expressly. But the ruling in *Whitney v. Buckman* cannot be considered in any way an authority that an appeal can be taken in the case before us.

In *Williamson v. Monroe*, 3 Cal. 385, which is cited on behalf of appellant, it does not clearly appear from what the appeal was taken, but it may well have been taken from the order appointing the receiver, as the practice act then in force allowed an appeal from any order made affecting "a substantial right in an action or special proceeding." Section 347, Pr. Act 1861, (St. 1861, p. 106.)

Guy v. Ide, 6 Cal. 99, was an action to foreclose a mortgage. Prior to judgment a receiver of the rents and profits was appointed. A judgment of foreclosure was rendered, and afterwards a motion was made to vacate the order appointing the receiver. This motion was made by Ide, who was a purchaser from the mortgagor, subject to the mortgage. The motion was denied, and the appeal was taken

from the judgment and the order denying the motion to vacate. The court affirmed the judgment, and reversed the order appointing a receiver. No point was made as to the appealability of the order. Its appealable character was not contested, and it may well have been that counsel waived this point, desiring to have the opinion of the court on the point decided as to the receiver. It may be remarked that the order appealed from was one made after final judgment in the action, and it may be that it was accepted as one appealable in consequence, as a special order made after final judgment.

In *Neall v. Hill*, 16 Cal. 149, the appeal was from a final judgment, and the appointment of the receiver was made by the judgment or decree. The judgment was reversed, and the order of appointment, (from which no appeal was prosecuted,) as a part of the judgment, shared its fate.

Corcoran v. Doll, 35 Cal. 479, was on appeal from "an order granting an injunction and appointing a receiver." The court affirmed the order. The order granting the injunction was appealable, and the appeal brought up the whole order, just as in *Neall v. Hill*, the appeal from the final judgment brought up the order appointing the receiver, as a part of it. The order in *Corcoran v. Doll* was a writ, as was the judgment in *Neall v. Hill*. The reversal of the judgment in the latter case reversed the entire judgment, as the affirmance of the order in the former affirmed all its parts. The court, in *Corcoran v. Doll*, treated the order as but one order. In *Meadow Valley Mining Co. v. Dodds*, 6 Nev. 262, the appeal was from an order made before trial, in which order there were words of restraint upon the defendants, and also language appointing a receiver. The order is stated at length in the opinion of LEWIS, C. J., on pages 262, 263. The question whether the statute allowed an appeal from this order was considered by the court. The statute of Nevada allowed an appeal "from an order granting or dissolving an injunction." The court held that the order, so far as it related to the appointment of a receiver, was not appealable. So far as it could be considered as an order of injunction, the court, of course, under the statute, did take cognizance of the appeal, and affirmed the order. We consider this a distinct ruling that an order appointing a receiver is not appealable. And as the statute of Nevada is, so far as concerns the question under consideration, like the statute of this state, we hold it to be authority on the point of the character of the order as to its appealability. The case from Nevada, and the *French Bank Case*, *supra*, expressly hold that such an order is not appealable. We find none holding the contrary.

We do not consider *Schlecht's Appeal* (60 Pa. St. 172) as laying down a different rule. We interpret that case as reversing an order appointing a receiver, because it was part of an injunction order, from which an appeal was and could, under the Pennsylvania act of assembly, be prosecuted. The court professes to reverse the receiver

order only in this way, and does not treat the latter order as at all appealable. The decree for an injunction and receiver was declared by the court to be a unit; and as it was erroneous in part as to the injunction, such error affected the entire decree, and must have led to a reversal, though the order of appointment may have been lawful and regular. There is nowhere, in the clear and unmistakable language of the opinion, any intimation that the order appointing a receiver is appealable. On the contrary, the intimation is the other way.

But it is argued, and with much plausibility, that the order here appealed from is in fact an injunction, and the appeal should be upheld as one from an order granting an injunction. It is argued that the order, if executed, must operate as a restraint upon the rights of the parties to hold and manage their lands. While this may be so, still there are no restraining words used in the order, and we cannot, then, hold it an injunction order. If we held such an order to be an injunction, the same must be held as to every order appointing a receiver; for such orders, when executed, must to some extent be a restraint upon the rights of some one. Moreover, we cannot conclude that we would be justified in holding that the law-making power intended to give an appeal in so important a matter as the appointment of a receiver by the words giving an appeal upon granting an injunction. Should we so hold? Ought we not also to rule that an appeal is given from an order refusing to appoint a receiver by the words which allow it when an injunction is refused? It will be observed that "injunctions" and "receivers" are treated of in distinct and separate chapters of the Code of Civil Procedure. On granting an injunction an undertaking with sureties is, with a few exceptions, always required of the applicant, (Code Civil Proc. 529;) while in the case of the appointment of a receiver such an undertaking is only required of the applicant when such appointment is asked for *ex parte*. Id. 566. The condition required in the former undertaking is entirely different from the one required in the latter. See sections last cited.

If an order appointing a receiver is an injunction order, then the undertaking prescribed by law upon making the latter order must be required and given on making the order for a receiver, or the procedure will be irregular. According to our observation of the practice, such an undertaking is never required when a receiver is appointed. This shows unmistakably a general concurrence, both by bench and bar, that an order appointing a receiver is not an injunction. Considering all these circumstances, we are of opinion that we would go astray from the law in holding that the order appealed from is an injunction, and appealable as such. We feel compelled, although strongly impressed with the argument of counsel for appellants, to hold that the order appointing the receiver in this case is not appealable, and that the appeal from it should be dismissed. In holding the order here not appealable, we are in accord with the *French Bank Case* and the *Meadow Valley Mining Co. v. Dodds*, *supra*.

In the latter case the court expressed the opinion that such an order would be reviewed on an appeal from the final judgment. This was clearly *obiter*, as no such question was before the court for decision. The contrary conclusion was reached by our predecessors in the *French Bank Case*, where the question was presented for decision. The question does not arise here, and we decide nothing in regard to it. If an appeal should be allowed from an order appointing a receiver, the legislature will no doubt supply the proper legislation.

In accordance with the foregoing, it is ordered that the appeal from the order appointing a receiver be and is hereby dismissed.

It is further ordered that the court below, on the return of this cause to it, do proceed to vacate the orders denying a new trial as prematurely made, and upon such evidence as has been already taken, and such other and further evidence as will be adduced by the parties, proceed to determine the issues as to the tax assessments and the tax levies mentioned in the twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, and thirty-second findings, and as to the judgments of justices' courts, mentioned in the thirty-first and thirty-second findings, and find the facts as to the same in accordance with the directions of this opinion; that as to any issues of fact not already determined in this cause, that it proceed, upon such evidence as has been already taken, and upon such other and further evidence as shall be adduced before it, to determine such issues and find the facts in regard to the same, taking care, in all cases where there is a contest as to a fact, to find the naked fact segregated from any question of law; that the findings of fact, except as to the issues above mentioned to be passed on, are correctly determined.

And it is further ordered that the judgment be set aside and reversed, and that the court below, on the return of this cause to it, do proceed and ascertain and determine the rights and interests of all parties to the suit in the land to be partitioned, and that after all issues of fact yet to be tried have been determined, and interests of all parties in the land to be divided ascertained and determined, that the court will proceed upon the findings heretofore made and herein approved, and those hereafter to be made under the directions of this court, to render the first or interlocutory judgment herein; that it specify in said judgment the rights and interests of all parties to the action; that it then proceed to adjudge a partition of the land between the parties according to the rights and interests so ascertained and determined, with liberty to the court, if it should be of opinion that the conditions exist as prescribed by section 760 of the Code of Civil Procedure, to order by such judgment a partition in accordance with such section among the original tenants.

And if such partition is ordered under said section 760, that the said court specify in the judgment the parties claiming under the original co-tenants, whose possessions and improvements are to be embraced and included in the share allotted to the original tenant under

whom they claim; and, after making such partition among the original tenants, that it proceed to adjudge and make partition so ascertained and allotted as between those claiming under the original tenant to whom the same shall have been so set apart, or allow them to remain tenants in common thereof as they may desire.

And it is further ordered that in all further proceedings herein in the court below that regard be had to the rules laid down in the foregoing opinion.

We concur: MORRISON, C. J.; MYRICK, J.

SHARPSTEIN, J., concurring. It being the opinion of the majority of my brethren that the findings of the court below, with the exceptions specified by Mr. Justice THORNTON, ought not to be disturbed, I concur in the foregoing judgment.

McKEE, J., concurring. I concur in the judgment of reversal. The first thing necessary to be done by a court in which an action of partition has been commenced is to obtain jurisdiction of the persons of those who claim to be entitled to the land sought to be partitioned. Having obtained jurisdiction by any of the modes prescribed by law for that purpose, the parties of whom jurisdiction has been obtained are required to answer as to the nature and extent of their respective interests; and if any of the answers made raise issues of adverse claims for any parts of the land, the court must then proceed to try and determine such issues. As, in an action for the settlement of partnership affairs, the first inquiry is whether the parties to the suit are partners, so in an action of partition the first inquiry must be whether all the parties to the action are tenants in common; and that inquiry can only be reached after the final determination of the rights asserted by adverse claimants to any parts of the land; for the issues raised by the assertion of such rights are in the nature of issues of law, and must be decided before any steps can be taken in the proceeding for partition. It is only after their decision that the court can know who are entitled to partition. And having disposed of those issues, and ascertained who are the tenants in common between whom the land is to be partitioned, the next step in order is to ascertain and determine the respective rights and interests of each of the tenants in common, in the mode prescribed by sections 763, 764, 765, and 799, Code Civil Proc., and adjudge partition between them according to their respective rights.

The ascertainment and determination of these things in the order named are essential to the validity of an interlocutory decree in a partition proceeding, (chapter 4, Code Civil Proc.;) and such has been the procedure followed in such actions by courts of chancery from the time when the English court of chancery (by judicial construction of the statutes 31 & 32 Henry VIII., which made joint tenants and ten-

ants in common accountable to each other) assumed jurisdiction of actions of partition, upon the ground that under that statute tenants in common of real property held possession as trustees for each other. Before that statute partition at common law was not enforceable against either joint tenants or tenants in common. By the passage of that statute they were placed upon the same footing as to partition with co-partners, and partition enforced against them by a writ of partition; and concurrent jurisdiction of such actions was exercised by courts of law and courts of equity until the writ of partition was abolished by St. 3 & 4 Wm. IV.; and thereafter the only mode of enforcing partition was by bill in chancery.

The procedure in chancery in actions of partition has been substantially embodied in the provisions of chapter 4 of the Code of Civil Procedure. In some circumstances it differs. In chancery, partition proceedings were suspended until the issues raised by adverse claimants to any portions of the land were tried and determined by actions of ejectment in the courts of law. The same legal effect follows the raising of such issues in a partition proceeding in this state under the Code; only, instead of sending the parties to a court of law to litigate the questions of title between them, the court in which the proceeding is pending has jurisdiction to try and determine *all* issues, whether at law or in equity, and must determine them as part of the proceeding itself, (section 759, Code Civil Proc.; *De Uprey v. De Uprey*, 23 Cal. 352; *Morenhout v. Higuera*, 32 Cal. 294; *Gates v. Salmon*, 35 Cal. 597;) and until those issues are disposed of, and the tenants in common of the property are ascertained and enumerated, and their respective interests and rights have been ascertained and determined, the case cannot be considered as tried. Section 760 of the Code of Civil Procedure is not in conflict with these views. That section provides: "Whenever from any cause it is, in the opinion of the court, impracticable or highly inconvenient to make a complete partition, in the first instance, among all the parties in interest, the court may first ascertain and determine the shares of interest respectively held by the original co-tenants, and thereupon adjudge and cause a partition to be made as if such original co-tenants were the parties, and sole parties in interest, and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted as between those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof, as they may desire."

The thing to be observed is that the authority of the court "to adjudge and cause a partition to be made between the original co-tenants, as if they were the parties, and the only parties, in interest, or to the action," is made to depend upon the fact that it will be made "impracticable or highly inconvenient to make a complete partition in the first instance between *all* the parties in interest." But who are

all the parties in interest? That must be ascertained and determined before it can be decided whether a complete partition in the first instance between the parties is impracticable or inconvenient. But how shall it be ascertained and determined before the issues made by the answers of adverse claimants are finally disposed of? The ascertainment of those who are "the parties in interest," or tenants in common of the land, is therefore a fact which lies at the threshold of every action of partition, and at the foundation of every one's right to partition; and whether it would be impracticable or highly inconvenient to make partition between them in the first instance is also necessarily connected with the fact. Both are judicial questions, and the latter cannot be determined if the court has not ascertained and does not know who are the parties entitled to partition. That has not been done in this case. Issues of law between adverse claimants of parts of the ranch sought to be partitioned have never been heard and decided. It has never been found who are the tenants in common of the ranch, and what are their respective interests and rights therein, or whether it would be to their prejudice, or impracticable, or highly inconvenient to make partition between them. It may be, after it shall have been ascertained who are the owners of the ranch, and what are their respective interests therein, that the court may find it neither impracticable nor inconvenient to make partition between them. If so, it would plainly be the duty of the court to decree partition in the first instance between them, without the necessity of double investigations, double interlocutory decrees, double commissioners, double reports, double confirmations of reports, and without the burden of costs and expenditures which such an elaborate judicial proceeding would entail.

I therefore think the interlocutory decree should be reversed, because the court has not heard and determined the issues raised in the proceeding by the answers of adverse claimants to portions of the ranch; because it has not been ascertained who are the tenants in common of the ranch; and because the respective rights and interests of the tenants in common have not been found. The court below should be directed to proceed to hear and decide these things upon the evidence already taken in the case, and such other evidence as may be given by the parties.

Ross, J., *dissenting*. I dissent from the judgment, and am of the opinion that the interlocutory decree appealed from should be affirmed. Except with respect to the construction of section 760 of the Code of Civil Procedure, and to the findings in relation to taxes and judgments for taxes, I agree with the conclusions reached, and with much that is said in support of them in the opinion of Mr. Justice THORNTON. I do not agree to the conclusions reached in the opinion in regard to the findings just alluded to. Nor am I able to agree with my associates in their construction of section 760 of the Code of

Procedure. By them it is held that under no circumstances can any interlocutory decree in partition be made until the interest of each and every owner is first ascertained and determined. In the absence of the above-cited statutory provision that would undoubtedly be so. But the legislature has seen fit to declare that "whenever, from any cause, it is, in the opinion of the court, impracticable or highly inconvenient to make a complete partition in the first instance among all the parties in interest, the court *may* first ascertain and determine the shares or interest respectively held by the original co-tenants, and thereupon adjudge and cause a partition to be made as if such original co-tenants were the parties and sole parties in interest, and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted as between those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof, as they may desire." Code Civil Proc. § 760. It seems to me that the view taken by my associates in effect nullifies this provision of the statute.

McKINSTRY, J., being disqualified, took no part in the decision.

(65 Cal. 22)

HOG'S BACK CON. M. CO. v. NEW BASIL CON. G. M. CO.

Filed February 2, 1884.

A judgment rendered by a department is not final until the expiration of 30 days, (unless the chief justice and two associate justices shall approve it,) and no *remittitur* should be issued by the clerk until that time.

An attorney may well rely upon information furnished by the clerk of the court below as to when a *remittitur* was filed with him, even though, through the inadvertence of a deputy clerk, it was erroneous.

Department 2.

W. R. Dangerfield and E. Lynch, for appellant.

Hale & Craig, for respondent.

MYRICK, J. This is an appeal from a default judgment, and from an order denying defendant's motion to vacate and set aside the judgment and the default. This case was before this court on appeal from a former default and judgment, and this court, in department 2, on the eighth of February, 1883, made an order reversing the judgment, on the ground of defective service of an amended complaint. 11 Pac. C. Law J. 60. The dates herein mentioned become material. On the

thirteenth of February the appellant moved the department that the judgment be modified so as to give time to file an answer in the court below. On the twenty-third of February the department made an order reversing the judgment of the court below and remanding the cause, "with leave to appellant to file an answer to the complaint within twenty days after the filing of the *remittitur* in the court below." On the twelfth of March the clerk of this court, by a deputy, issued a *remittitur*, which consisted of a certified copy of the order of February 8th, to which was attached a copy of the order of February 23d. This *remittitur* was filed in the court below March 14th; but, by inadvertence, the deputy clerk of this court failed to note in his register or elsewhere that it has been issued, and the fact of its issuance escaped his recollection until April 9th. Not until April 7th did the appellant learn of the issuance of this *remittitur*. He made frequent inquiries at the office of the clerk of this court whether a *remittitur* had been issued, and, if not, when it would be, and was informed (through the inadvertence above mentioned) that none had been issued, and that none would be until the expiration of 30 days from February 23d, which would be March 25th. The appellant's attorney had requested the clerk of the court below to inform him at once whenever a *remittitur* should be filed. The clerk's office was at Auburn, Placer county, and the attorney for appellant resided in the city and county of San Francisco. On the twenty-seventh of March, a *remittitur*, based on the order of February 23d, was issued and filed in the court below March 31st. The attorney for the appellant, supposing he had 20 days from this date to answer, prepared an answer, which was verified April 3d, and on the ninth of April sent it by mail to the clerk, and a copy for service. On the tenth of April, the court, on motion of respondent, caused the default of the defendant to be entered, and rendered judgment thereon in favor of plaintiff. This action by the court was based on the proposition that the first *remittitur*, being filed in the court below March 14th, and the defendant having 20 days thereafter to answer, and not having answered within that time, was in default.

We think the motion to set aside the judgment and default should have been granted for two reasons:

(1) The first *remittitur* was improperly issued. A judgment by a department is not final until the expiration of 30 days from its rendition, unless the chief justice and two associate justices shall approve it. Const. art. 6, § 2. The judgment of February 8th remained unquestioned but five days, and then a motion to modify was made, which was taken under advisement, and not decided until February 23d, when a judgment as modified was entered. The *remittitur* should not have been issued for 30 days thereafter, the order not having been a *nunc pro tunc* order. This *remittitur* would doubtless have been recalled on motion. The second *remittitur* was issued March 27th, and filed below March 31st. The defendant had 20 days there-

after to answer, and within that time its attorneys did all that they could to that end.

(2) The defendant's attorney having made repeated inquiries of the clerk of this court if a *remittitur* had been issued, and having been repeatedly informed that none had, and that none would be until March 25th, and no entry of the issuance of the *remittitur* having been made, (through the inadvertence of a deputy, as above stated,) we think he might well have relied upon such information, coming as it did from an officer having custody of the records, where an entry should regularly have been made. Admitting that the *remittitur* of March 12th was regular on its face, yet, when that of March 27th, showing the order of February 23d, was called to the attention of the court below, it should have permitted defendant to be heard, and interpose its defense.

The order denying defendant's motion to vacate is reversed, and the cause is remanded, with instructions to set aside the judgment and default, and that the answer of defendant be filed at any time within 30 days from the filing of this opinion, and that further proceedings be thereupon had as provided by law.

We concur: THORNTON, J.; SHARPSTEIN, J.

65 Cal. 19

ESTATE OF LANG.

Filed February 2, 1884.

Certain findings of the jury in this case are not only unsupported by the evidence, but are in direct opposition thereto.

It cannot be said as a rule of law that because a man is a drunkard he is of unsound mind.

Where a party is found to be of unsound mind, his declarations cannot prove the truth of matters declared by him; nor in such a case can threats or undue influence cut any figure as to the validity of a will executed by him.

Department 2.

Wendell & Kelly, for appellant.

J. McKenna and *C. R. Coghlan*, for respondent.

MYRICK, J. Three papers were offered for proof as to which, if any, was the last will of the deceased. The widow of deceased was the proponent, and certain of his children were contestants. The papers are dated, respectively, October 6, 1879, November 9, 1880, and December 3, 1880. The case arising on the contest was tried by a jury, and answers were returned to the special issues submitted.

We do not see the basis upon which some of the answers were founded, unless the jury were of opinion that they were arbitrators of some matters of difference between the widow and children, instead of determining as to the condition of the deceased. The jury should have had nothing to do with the family feuds, except as bearing on the testamentary capacity of the deceased. Further than that, likes and dislikes are of no moment in this case.

The jury found that the deceased was of unsound mind at the date of the paper of October 6, 1879, and that he was induced to execute it by the undue influence of his wife. There is no evidence appearing in the transcript to support either of these findings; the evidence is the reverse, and is uncontradicted. The deceased had been addicted, for years, to the use of intoxicating liquors; but, as we said in *Estate of Johnson*, 57 Cal. 529, "we cannot say, as a rule of law, that because a man is a drunkard, therefore he is of unsound mind." The jury had not evidence before them of the effect his intemperate habits had upon his testamentary capacity in October, 1879.

The jury found that the deceased tore his signature from the paper of October 6, 1879, with intent to revoke it as a will, and that he was of unsound mind at the time of the tearing. There is evidence to sustain these findings; though, if he were of unsound mind, the intent was nothing but an insane intent, and would not constitute an element of revocation.

The contestants claim that by declarations made by deceased during his last illness he was of unsound mind and under the undue influence of his wife, in the execution of the paper of October 6, 1879. Conceding (which we do not) that such declarations were competent evidence, it is sufficient to say that it was a part of the contestant's case to establish his unsoundness of mind at the time of his last illness. Such unsoundness was established, and was found by the jury; therefore, such declarations would not prove, or tend to prove, the truth of the matters declared by him.

The jury found that the deceased was induced to execute the paper of November 9, 1880, by the undue influence and threats of his wife. How far this was sustained by evidence is apparent from the testimony of the witnesses present. "Mrs. Lang was in the room at the time he dictated the will; she had a good deal to say about it; he reprimanded her for her dictation; the will was drawn as he dictated it." Again: "She opposed the making of it and provisions of it. She objected particularly to the brother having an interest in it. * * * He would damn her, and tell her to dry up. He threatened to put her out of the room, and persisted in making the will in spite of everything she said." We see here no evidence that the will was procured to be executed by the undue influence or threats of the wife.

The jury found that at the time of the execution of the paper of December 3, 1880, the deceased was of unsound mind. There is ev-

idence to support this finding. The jury also found that the deceased was induced to execute this paper by the undue influence or threats (which is not stated) of the wife; but, as he was then of unsound mind, threats or undue influence cut no figure for the purposes of this appeal.

The judgment and order are reversed, and the cause is remanded for a new trial as to issues, 1, 2, and 6. As to the other issues, the verdict will stand, subject to what is above said regarding the answer to issue 4.

We concur: THORNTON, J.; SHARPSTEIN, J.

65 Cal. 16

PEOPLE, etc., v. BARNES and others.

Filed February 2, 1884.

Where a charge states that the defendant stole two "cattle," without specifying what kind of cattle, and describes them as the property of "Page Bros.," without naming the brothers separately, the bond is not void by reason of a want of definiteness in the charge, and may be sued upon if the defendant fails to appear.

Department 2.

Geo. A. Lamont, for appellants.

A. J. Buckles, for respondents.

MYRICK, J. This is an action on a bail-bond. One Wilson was arrested on a complaint charging him with grand larceny in stealing "two head of cattle, of the value of twenty-five dollars each," "the cattle being the property of Page Bros." The magistrate held him to answer, and admitted him to bail in the sum of \$1,000. The bond in suit was given, and he was released from custody. He failed to appear, and, the bond having been declared forfeited, this action was brought. The plaintiffs had judgment. On the trial it was stipulated that Page Bros. was the firm name of a copartnership, consisting of Charles Page, Frank Page, and George Page, and that the cattle alleged to have been taken were the property of the copartnership.

The defendants claim that the bond is void, in that no offense was alleged, the charge being that Wilson stole two cattle, without specifying what kind of cattle; that the complaint did not state the name of the owners, "Page Bros." being no statement of the name, and that the magistrate had no jurisdiction to bind him over, but should have proceeded to try him for a misdemeanor, the value of the property not being more than \$50. The word "cattle" is defined by Wor-

cester to be "a collective name for domestic quadrupeds, including the bovine tribe, also horses, asses, mules, sheep, goats, and swine, but especially applied to bulls, oxen, cows, and their young." By section 487, Penal Code, it is made grand larceny to steal "a horse, mare, gelding, cow, steer, bull, calf, mule, jack, jenny, goat, sheep, or hog." If the party charged stole a bull, cow, steer, or calf, it was grand larceny, irrespective of the value. The use of the word "cattle," which included at least all these, would not render the bail-bond void. Neither would the use of the words "Page Bros." as designating the owners.

The judgment and order are confirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

65 Cal. 25

ESTATE OF JAMES.

Filed February 2, 1884.

The will bequeathed a certain sum "to be paid out of the first money realized from the estate after payment of debts." This sum became due only after the debts were paid, and not at the end of one year after the death of the testatrix.

Department 2.

J. F. Wendell and *C. R. Coghlan*, for appellant.

Geo. A. Lamont, for respondent.

BY THE COURT. The will of Orpha James contains this provision: "I give and bequeath to my eldest son, John Harvey James, five thousand dollars, (\$5,000,) to be paid to him by my executors, hereinafter named, out of the first moneys realized from my estate, when that amount shall come into their hands, after the payment of all my just debts and funeral expenses; and in case that amount is not realized from my estate, then I give and bequeath the whole amount realized to him; and in the event of the death of my son John Harvey James before I die, then I leave the portion bequeathed to him in this testament and will to his lawful children." The court below held that this legacy became due and deliverable at the expiration of one year after the testatrix's decease, and consequently bore interest from that date. We think the testatrix's express intention was that it should not become due and payable until after her debts and funeral expenses had been paid. As we construe the language of the will, it was to be paid out of the first moneys realized from the es-

tate after the payment of said debts and funeral expenses. This being the only question presented on this appeal, it follows that so much of the decree as awards \$962.50 interest to respondent on said legacy of \$5,000 must be reversed; and it is so ordered.

65 Cal. 27

BAKER v. EVERHART.

Filed February 4, 1884.

The schedule of an insolvent must be sworn to "before a judge having jurisdiction," etc., and not before a notary public.

Department 2.

J. E. Prenditt and Freeman & Bates, for appellant.

Jo. Hamilton, for respondent.

By THE COURT. The superior court did not have jurisdiction to make a decree discharging the alleged insolvents. The schedule was sworn to before a notary public, whereas section 4 of the act of 1852 required it to be sworn to "before the judge having jurisdiction," etc.

The judgment is reversed, and the cause is remanded, with instructions to render judgment for plaintiff on the findings.

SUPREME COURT OF CALIFORNIA.

65 Cal. 26

ALLENBERG and others v. ZELLERBACH.

Filed February 4, 1884.

There need not be a finding upon questions as to which no issue is raised. We cannot anticipate the violation by a court of an injunction order which it has recognized.

Department 2.

S. B. Davidson and Jarboe & Harrison, for respondent.

R. H. Taylor, Crittenton Thornton, and F. H. Merzbach, for appellants.

By THE COURT. It is urged here that there is no finding as to the manner in which plaintiff Allenberg got possession of the 30,000 shares of Altoona stock. We have examined the findings, and find all the issues in relation to this stock found upon. There is no issue as to the manner in which Allenberg got possession of the stock. There are averments in the answer that on the fifth day of May, 1879, defendant filed his complaint in another court in an action against Allenberg and the Goldsteins, in which complaint certain allegations were made in regard to the manner in which Allenberg got possession of the stock referred to. The issue raised by these averments, so far as material, was found upon. We see no error in the decree. The court recognizes in the decree the pendency of the injunction order restraining the sale of the stocks referred to above, and forbears to make in the decree any order for their sale. It may never become necessary to make any order for their sale, as the other property ordered by the decree to be sold may bring enough to pay the indebtedness secured. If, on the sale of the property last mentioned, there should be a deficiency, the court directs in its findings and decree that the plaintiff may, upon notice to the defendant, apply to the court for a writ or order directing the sale of the stock. When such application is made, the defendant may set up the injunction order restraining the sale, if it is then in existence; and we cannot anticipate that the court will then make an order directing the sale of the stock, unless it shall appear that the injunction order has been dissolved.

The judgment is affirmed.

THORNTON, SHARPSTEIN, and MYRICK, JJ., concurring.

(65 Cal. 37)

McCUTCHEON v. WESTON.

Filed February 8, 1884.

In an action on an undertaking, reciting that "if the plaintiff shall recover judgment in said action we will pay," etc., the allegation in the complaint that "a judgment was recovered, entered, and docketed," is sufficient. That there were two defendants, and judgment was recovered against one only, does not affect the liability on the undertaking.

Department 2.

R. L. McKee and B. McFadden, for respondent.*R. W. Redman*, for appellant.

MYRICK, J. Action on an undertaking given under section 540, Code Civil Proc. The averments of the complaint and the provisions of the undertaking are similar to those in *McNamara v. Hammerschlag*, ante, 391. On the authority of that case, and *Preston v. Hood*, 1 PAC. REP. 487, we hold that the points taken by the appellant relating thereto are not sustained.

The plaintiff, in pleading the recovery of the judgment in the attachment suit, avers that the plaintiff in that action "recovered judgment against the defendant therein, H. Leslie, which was rendered in said action for the sum of," etc., "which judgment was entered and docketed," etc. The plaintiff herein sued an administrator of the plaintiff in the attachment suit. In pleading his capacity he avers "that on the twentieth day of July, 1880, letters of administration upon the estate of said Robert McCutcheon, deceased, were issued by the superior court of the said county of Alameda to this plaintiff, who duly qualified as the administrator of said estate, and entered upon the discharge of his duties as such administrator; that plaintiff is now, and has been continuously ever since the said twentieth day of July, 1880, the administrator of the estate of said Robert McCutcheon, deceased." The complaint was not demurred to by reason of any alleged defect in either of these two particulars, nor because it did not state facts sufficient to constitute a cause of action, though there was a demurrer on other grounds.

The appellant presents the point in this court for the first time, that the complaint is insufficient, in each of the two particulars above noted, to sustain the judgment. We think the point not well taken. This is not an action on judgment, but it is on an undertaking. The undertaking reads, "If the plaintiff shall recover judgment in said action we will pay," etc.; the allegation in the complaint is that judgment was recovered, entered, and docketed. We think this sufficient. We think the allegation as to representative capacity is sufficient to sustain a judgment, there having been no demurrer on that ground.

The point that judgment was recovered against one of the defendants only, in the attachment suit, is not well taken. The action was against two, and the undertaking was to pay "if the plaintiff shall recover judgment in said action." Why judgment was recovered against one only, we are not informed; but the court had power to render such judgment, and it was rendered in that action.

The judgment and order are affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

65 Cal. 36

SANDERSON *v.* MCINTOSH.

Filed February 8, 1884.

Insolvency—Remedy of creditors—Equity jurisprudence.

Department 2.

Fuller & Howser, for appellant.

Park Henshaw, for respondent.

MYRICK, J. This action was brought to compel an assignee in insolvency to perform his trust and account for the property assigned. The court below gave judgment of nonsuit on the ground that the plaintiff had mistaken his remedy. We are of opinion that the remedy afforded creditors, under the law regulating insolvency proceedings, is not exclusive, but that courts of equity have jurisdiction.

Judgment reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; SHARPSTEIN, J.

65 Cal. 33

Ex parte MOYNIER.

Filed February 8, 1884.

Order No. 1,719, of the board of supervisors of the city and county of San Francisco, regulating the drainage and heating of public laundries, and the closing thereof on Sunday, is valid as under the police power of the state, and is not in conflict with the constitution of the United States or of this state.

Department 2. On *habeas corpus*.

Wilson & Perry, for petitioner.

MYRICK, J. The prisoner was arrested and is in custody for a violation of section 4 of order No. 1,719 of the board of supervisors of the city and county of San Francisco. The ordinance was approved June 25, 1883. Section 4 declares that "no person or persons owning or employed in the public laundries or public wash-houses provided for in section 1 of this order, shall wash or iron clothes between the hours of 10 o'clock P. M. and 6 o'clock A. M., nor upon any portion of that day known as Sunday." Section 1 declares it to be unlawful for any person to establish, maintain, or carry on the business of a public laundry or wash-house, where articles are cleansed for hire, within certain named limits, without having first obtained a certificate from the health officer that the premises are sufficiently drained, and that the business can be carried on without injury to the sanitary condition of the neighborhood, and a certificate from the board of fire-wardens that the heating appliances are in good condition, and that their use is not dangerous to the surrounding property. The petitioner claims that the order is void, in that it conflicts with the fourteenth amendment of the constitution of the United States, and with sections 1, 11, and 21 of article 1 of the constitution of this state. We do not see that the enforcement of this order would abridge the privileges or immunities of citizens of the United States, or that it would deprive any person of liberty or property without due process of law, or deny to any person in this state the equal protection of the laws. Section 1 of article 1 of the constitution of this state declares that all men have the inalienable right of acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness. Section 11 of the same article declares that all laws of a general nature shall have a uniform operation; and section 21 declares that no citizen or class of citizens shall be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.

We do not deem it necessary to go into an elaborate and extended consideration of the propositions advanced, nor to do more than quote another section of the state constitution, and show its application to the subject in hand. Section 11 of article 11 provides that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." That the regulations of the order are as to portions (perhaps all) police regulations, and as to some sanitary, we have no doubt. Those portions of the order relating to safety from fire are police regulations; that relating to drainage may also be classed as police, and is sanitary; that relating to drainage is also sanitary. It is true, all persons may acquire, possess, and protect property, and may pursue and obtain safety and happiness; but these rights must be exercised with reference to the rights of

others; and whenever it is necessary for the health or protection of members of the community that regulations should exist and be enforced, the power is given by the constitution to local authorities to make and enforce such regulations. We cannot say that proper drainage in carrying on the laundry business is not necessary to health; neither can we say that property is secure from fire if proper precautions are not taken. The order is not discriminating and special in any such sense as to make it repugnant to the constitution. Its terms apply to all persons establishing, maintaining, or carrying on the business of a public laundry or public wash-house, where articles are cleansed for hire, within certain limits. It is no more special and discriminating than the prohibition of the storage of powder or the slaughtering of animals, both of which may be necessary to be done, but for the regulation of which the power is unquestioned. We cannot say the limits prescribed in the Code are not proper limits for public health and safety. As to the provisions of section 4 of the order, which the petitioner was charged with having violated, we cannot say it is not necessary, nor the proper police and sanitary condition of the city, that the business referred to should cease during the hours from 10 o'clock P. M. to 6 o'clock A. M., and during the day known as Sunday.

The petitioner is remanded.

We concur: MORRISON, C. J.; THORNTON, J.

65 Cal. 42

PETERSON *v.* WEISSBEIN and others.

Filed February 12, 1884.

Where a party asks a court of equity to relieve him of a judgment of law for a debt, the validity of which he does not deny, and where he had ample opportunity for all defenses, solely on the ground that the complaint in the action was filed on a legal holiday, the case is not a proper one for such relief to be granted.

A motion denied in the justice court, and not sought to be reviewed in the superior court, will not be reviewed here.

Department 1.

A. J. Ridge, for respondent.

A. Burrows, for appellants.

Ross, J. The object of this suit, in which the plaintiff was successful in the court below, was to obtain a decree annulling a certain judgment rendered by a justice of the peace, and a certain sale of real property made under an execution issued upon the judg-

ment. The complaint in substance charges that the defendant, Weissbein Bros. & Co., a B. and B. corporation, is, and was at the times mentioned in the complaint, a corporation organized and existing under the laws of the state, and as such, on the ninth of September, 1882, placed in the hands of a certain justice of the peace a certain promissory note executed by the plaintiff herein for \$98.95, payable 60 days after its date, to one Walker or order, and which note was indorsed by Walker; that the justice of the peace, on said ninth of September, filed the note as a complaint, and in his docket entered the cause of Weissbein Bros. & Co., a B. and B. corporation, plaintiff, against A. P. Peterson, defendant, and thereupon issued a summons in the action, which was served upon the defendant therein, (plaintiff here,) and at the same time there was also served upon the defendant therein (plaintiff here) another or *alias* summons, which was issued in the action by the justice of the peace on the nineteenth of September, 1882. The complaint in the present action further charges that the plaintiff here (defendant in the action before the justice of the peace) failed to answer the complaint therein, and on the twenty-sixth day of September the justice of the peace rendered and entered a judgment in the action in favor of the plaintiff and against the defendant therein for the sum of \$116.90, on which judgment an execution was, on the next day, issued and placed in the hands of the constable of the township, who levied it upon the land, which is alleged in the complaint in this action to have consisted of two separate and distinct tracts, and to have then and since been the property of the present plaintiff. The complaint further charges that, after notice, the constable sold the land at public auction to the plaintiff in the action (the defendant corporation here) for the sum of \$128.40, and that thereafter, and on the twenty-first of October, 1882, the constable executed to the defendant Goldberg a certificate of sale for the land, which was duly recorded in the recorder's office of the county where the land is situate, and which, it is alleged, "still remains of record and is a cloud upon plaintiff's title, and if not removed would involve him in litigation, and might cause the loss of his said property." It is also charged in the complaint that the ninth of September, 1882, was a legal holiday, and, further, that the constable levied upon and advertised the land for sale as separate and distinct parcels, but nevertheless sold the same in one body, for which reason plaintiff here moved the justice of the peace to set aside the sale, but his motion in that behalf was denied.

The findings of the court below are in substantial conformity to the facts alleged in the complaint. The judgment decrees null and void the judgment entered in the justice's court, and the execution sale thereunder, and quiets the plaintiff's title to the property as against the defendants to this action, and all persons claiming under them, and perpetually estops defendants and all persons claiming under them from setting up any title or claim thereto. With respect to the judg-

ment given in the justice's court, the sole point relied upon by the plaintiff here is that the complaint on which that judgment was rendered was filed on a legal holiday, and that, therefore, there was in contemplation of law no filing, and as a legal consequence that all subsequent proceedings in the action were utterly void and of no effect. There is in the complaint no averment, nor is there anything in the record to indicate, that the debt for which judgment was given in the justice's court was not justly due from the defendant to the plaintiff in that action. It is not pretended that judgment there was obtained by means of any fraud or surprise, nor that the present plaintiff had any defense to that action upon the merits. It is only claimed that the judgment there given was void because the complaint in the action was filed on a day that had been by the governor of the state declared a legal holiday, of which, however, the court below finds the justice of the peace and the plaintiff in the case were in fact ignorant. The case, in truth, is one in which a party asks a court of equity to relieve him of a judgment rendered by a court of law for a debt which he does not deny, but impliedly, at least, admits owing, and which judgment was rendered in an action in which he had ample opportunity to make the point he now relies on, but of which he negligently omitted to avail himself. Under such circumstances it is clear that a court of equity should withhold relief. *Gregory v. Ford*, 14 Cal. 142, and cases there cited. As respects the sale of the land in one parcel, it appears, as has already been said, that the plaintiff here made a motion in the justice's court to have the sale set aside on the ground that the property was not separately sold, which motion was denied; but why, does not appear. Nothing to the contrary appearing, the presumption is that the motion was properly denied. If aggrieved, he could have had the action of the justice's court reviewed by the superior court on appeal from the judgment. Code Civil Proc. § 980.

Judgment reversed, and cause remanded.

We concur: MCKINSTRY, J.; MCKEE, J.

2 Cal. Unrep. 262

LYTLE CREEK WATER CO. v. PERDEW and others.

Filed February, 1884.

Any rights which a riparian proprietor would have to the water of the creek which touched his land, if his settlement was after the act of 1866 took effect, would be subject to the previously confirmed appropriation of the water.

In the absence of any finding as the order in which the persons interested in the appropriations of the water should use it, no decree can be entered in favor of the plaintiff which would not prejudice the other owners. The cause must be remanded, with directions that all claimants of the water rights be made parties.

Department 1.

Byron Waters, for appellant.

Satterwhite & Curtiss, for respondent.

McKINSTRY, J. The complaint alleges that plaintiff is the owner of "all the flow" of Lytle creek. The court below found that before the end of 1856 all the waters of Lytle creek had been appropriated by several persons, each acting separately, and claiming to appropriate a portion of the waters, and the waters thus appropriated by the various persons who appropriated the same, and those claiming to be their successors, were used "by turns separately and consecutively, each upon his separate land for a certain length of time, measured by hours and minutes, under the regulations of the board of water commissioners of this (San Bernardino) county, prescribing how often and the length of time each should be entitled to use the same, varying in time according to the extent of interest each held in the water so appropriated," etc. "Such separate interests in the water were held by the individuals separately, and sold, transferred, or abandoned by them respectively at their will." That plaintiff was the owner, through mesne conveyances and transfers of interests, of a portion of the waters of Lytle creek, appropriated as aforesaid, "equal in amount to the use of all the waters of said creek one hundred and thirty-two hours and nineteen minutes out of each and every three hundred and seventy-two hours." That defendant A. G. Perdew, in 1867, "settled upon a tract of government land near said Lytle creek, and within the flow of the same," and "diverted and appropriated from said Lytle Creek," etc. No question as to the use of the waters of a stream by *riparian proprietors* is presented by this record. There is nothing in the pleadings or findings to indicate that when all the waters of Lytle creek were appropriated, any of the lands by or through which the creek flows had passed into private ownership. It must be presumed, therefore, that such lands were public lands of the United States, and the rights to the waters of Lytle creek acquired by prior appropriation were confirmed by the act of congress of 1866. 14 U. S. St. 218. The court found that the settlement on government land by defendant, (conceding that this tract touched the creek,) was made after the act of 1866 took effect. Any rights which he might acquire, therefore, from the government would be subject to the previously confirmed appropriations of the water.

The plaintiff and the other persons claiming rights in the waters of the creek derived from the original proprietors were not tenants in common. The convention *inter sese* of the owners of the use of all the waters appropriated, by or under which the water was used for recurring periods of time by each, did not make them tenants in common. Plaintiff had a separate title to the use of all the water 132

hours and 19 minutes of every 372 hours. It is manifest that, in the absence of finding or evidence as to the order in which the persons interested in the appropriations of water used it, or as to the times when the periods during which the plaintiff would be entitled to the exclusive use of all the water would recur, no decree could be entered fixing the rights of plaintiff, or prohibiting the defendant from interfering with plaintiff's rights. It is equally manifest that no decree determining the rights of plaintiff or protecting them against the acts of defendant could be entered which would not prejudice the other owners deriving from the prior appropriators. Suppose, for example, the court had decreed that plaintiff would be entitled to the exclusive use of all the waters of the creek for a period of 132 hours and 19 minutes, commencing at 12 o'clock M. of the first day of October, 1883, and to an exclusive use of the waters for a like period commencing 239 hours and 41 minutes after the expiration of the first period, (and so on,) such decree would not conclude the rights of the other owners of the use, and the result might be that the defendant would only be enjoined for periods to which others than the plaintiff would be entitled to the use of all the waters. Hence, it was the duty of the court to order the other persons interested in the use of the waters to be brought in as necessary parties to the controversy. Code Civil Proc. 389.

Judgment reversed, and cause remanded, with direction to the court below to order that all persons claiming or owning rights to the use of any of the waters on Lytle creek be made parties to the action.

We concur: McKEE, J.; ROSS, J.

65 Cal. 40

CARNEY v. ARIZONA MINING Co.

Filed February 11, 1884.

The United States statute requiring certain work to be done and improvements made each year upon mining claims, applies to *placer* claims as well as *lode* or *vein* claims.

In Bank.

S. B. Davidson and C. W. Cross, for respondent.

P. Vanchief, for appellant.

By THE COURT. When this case was before department 2 of this court (10 Pac. C. L. J. 572) it was held that that provision of the Revised Statutes of the United States requiring a certain amount of

work to be performed or improvements made during each year on each mining claim located after the tenth day of May, 1872, and until a patent issues therefor, applies as well to that class of claims known as placer claims as to the class known as lode or vein claims. We are satisfied of the correctness of that construction of the statute. And that it is the view taken by the supreme court of the United States is evident from the recent decisions by that court in the cases entitled *Jackson v. Roby* and *Roby v. Jackson*, 3 Sup. Ct. Rep. 301, as well as from the opinion in *Smelting Co. v. Kemp*, 104 U. S. 536.

Judgment reversed and cause remanded, with instructions to render judgment for defendant as to the lands within its location.

65 Cal. 54

SCHWARTZ v. PALM and others.

Filed February 12, 1884.

If a decree of foreclosure should order the sale of a greater or less interest than that described in the complaint and mortgage, it is erroneous, and should be corrected upon motion. *Chase v. Christiansen*, 41 Cal. 256.

Department 1.

Geo. Cadawalader and *W. B. Treadwell*, for respondent.

Young & Young and *T. S. Sprague*, for appellants.

MCKEE, J. Action by a mortgagee against a mortgagor, and a subsequent purchaser from him of the mortgaged premises, to foreclose a mortgage given to secure payment of a promissory note. Default, judgment, and a decree of foreclosure were entered in the case. From the decree and order denying a motion to amend it, the subsequent purchaser has appealed, upon the ground that the decree exceeds the relief demanded by the plaintiff in his complaint. Section 580, Code Civil Proc. A decree of foreclosure should direct a sale of the particular estate or interest of the mortgagor in the mortgaged premises, as the same has been described in the mortgage, because it is that, and only that, which has been mortgaged as security for the payment of the mortgage debt. If such a decree directs the sale of any greater or less estate or interest than that described in the complaint and mortgage, it is erroneous, (*Chase v. Christiansen*, 41 Cal. 256,) and should be corrected on motion. In this case the mortgaged premises was described in the complaint and mortgage as: "The one undivided fourth interest, being all the interest which the mortgagor owns in two certain tracts of land in Yolo county, state of California, described as * * * swamp land surveys numbers 283 and 284, of swamp

and overflowed lands in Yolo county, bounded," etc.; and the plaintiffs asked that "the usual decree be made for the sale of said premises described in said mortgage." The decree ordered a sale of the mortgaged premises as hereinafter described; but after describing the same as in the complaint and mortgage, it added the following: "Including herein *all* the interest which the mortgagor had in each and both of said tracts of land on the twenty-sixth day of July, 1878, when said mortgage was given." In that particular the decree went beyond the relief to which the plaintiff was entitled. The mortgage was only upon an undivided one-fourth interest in the two tracts. It may be that the mortgagor had a greater interest, although he said he had not. If he had he did not mortgage it, and it passed to the subsequent purchaser unaffected by the mortgage. At all events, the court could not, by its decree, subject to sale a greater interest than was in fact mortgaged. The motion made by the defendant, Carrol, to correct the decree should have been sustained.

Order reversed and cause remanded, with direction to the court below to modify its decree as requested; and when so corrected the decree will be affirmed.

We concur: MCKINSTRY, J.; ROSS, J.

65 Cal. 49

VANDERFORD *v.* FOSTER.

Filed February 12, 1884.

A court should grant a nonsuit after all the evidence is in, if a verdict for the plaintiff would have to be set aside as not supported by the evidence; but a motion for a nonsuit should rarely be resorted to after the defendant's evidence is in.

Department 1.

C. R. Barry and J. F. Elison, for appellant.

Chipman & Garter, for respondent.

BY THE COURT. In *Geary v. Simmons*, 39 Cal. 224, it was held, a court is justified in granting a nonsuit, after the evidence on both sides has been heard, in a case where, if the motion had been denied and a verdict found for the plaintiff, it would have been set aside as not supported by the evidence. If the case before us had gone to the jury upon the evidence in the transcript, it would have been the duty of the court to set aside a verdict in favor of the plaintiff, on motion. It comes within the rule laid down in *Geary v. Simmons*. We think it proper to say, however, that the practice of moving for nonsuit

after the defendant's evidence is in, should rarely be resorted to. Especially is this so when, as in the case at bar, the plaintiff introduced evidence to sustain all the averments of the complaint, as against a mere trespasser, and the materiality of establishing an immediate delivery, and actual and continual change of possession only appeared after the defendant had made out his affirmative defense that he was sheriff, and took the property under process, etc.

Judgment and order affirmed.

(65 Cal. 53)

COGLAN v. BEARD.

Filed February 12, 1884.

In cases of contested elections, the ballots themselves, if rigorously preserved, are the highest and best evidence, and the burden of proof is on the contestant to prove that they have not been tampered with, and not upon the defendant to show that they have been fraudulently disturbed.

It is error for the court to assume that the ballots had been undisturbed because it was not satisfied from the evidence that actual fraud had been committed.

Upon the issue made by the pleadings there is no finding either of the ultimate facts, or of such probative facts from which the ultimate ones necessarily result; the argumentative findings do not support the judgment.

Department 1.

John C. Curley and W. H. Beatty, for appellant.

S. S. Hall, Jones Martin, W. C. Van Fleet, and W. A. Anderson, for respondent.

McKINSTRY, J. This was an action, under the provisions of the Code of Civil Procedure, to contest the right of defendant to the office of county clerk of Sacramento, to which he was declared elected by the board of supervisors. From a judgment in favor of plaintiff the defendant has appealed.

Any elector may contest the right of a person declared elected to an office, "for malconduct on the part of the board of judges, or any member thereof." Code Civil Proc. § 1111, subd. 1. And in his written statement or complaint the contestant is required to set forth specifically "the particular grounds of such contest." Id. § 1115. In the case at bar the ground of contest alleged in the plaintiff's statement or complaint is that in the several election precincts the boards of election "were guilty of malconduct, committed as follows: That said board of election counted and tallied ballots for the said M. R. Beard, for the office of county clerk, upon which the said Beard's name did not appear, and that said board failed, neglected, and re-

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fused to count and tally ballots for C. M. Cogan, for the office of county clerk, upon which the name of said Cogan did appear." The averments of the complaint are specifically denied. The ballots supposed to have been cast by the voters were recounted in the presence of the court. In nearly every precinct the recount resulted in a gain to the contestant and a loss to the defendant. The results reached by the recount as to *two* of the precincts were rejected by the court below, the learned judge saying in the findings: "While there is not sufficient evidence to satisfy my mind that the ballots have been tampered with or fraudulently manipulated in any way, still, from the circumstance of the package having been opened, and a very considerable variance being found between the returns and the actual count of the ballots, I think it *unsafe* to adopt the recount, and therefore in this precinct I take the returns." The packages of ballots which the court below considered it "unsafe" to treat as not having been tampered with or "fraudulently manipulated,"—although the evidence was not sufficient to satisfy the mind of the judge that there had been such tampering or fraud,—had been in the same custody as the packages assumed to have been sent from the other precincts. As to some of these the names of the election officers were not written across the seals fastening the packages, nor were the packages clearly identified. The packages were placed in a vault in the hall of records, of which the clerk retained the keys in his possession. The janitor of the court house, his assistant, and several members of the board of supervisors each had a key to the room in which was the vault. The locks on the doors of the vault were ordinary tumbler locks, which could be unlocked by any person having a key to match the locks.

If the evidence on the part of the contestant satisfied the mind of the judge that the ballots from the two precincts had not been tampered with, he should have adopted the result of the recount, and not the returns from those two precincts. The action of the court below could be justified only because the evidence failed to overcome the presumption created by the returns—failed to satisfy the court that the ballots had not been tampered with. But if the evidence failed to prove that the ballots claimed to have been cast in two of the precincts had not been changed, how did the court reach the conclusion that the ballots from other precincts had remained unaltered, it appearing that those who had tampered with some might have tampered with all? It is evident, however, the court did not base its rejection of the recount as to the two precincts upon the failure of contestant to establish affirmatively that the ballots had not been tampered with, but that they were rejected out of abundant caution, because it was "safer," the judge saying, "there is not sufficient evidence to satisfy my mind that the ballots had been tampered with, or fraudulently manipulated in any way." Thus the court below, in effect, held that as the ballots had been in charge of the county clerk,

the presumption was that they had not been changed, and it was for the defendant to prove that fraud had been committed with reference to them. This idea appears throughout the findings. Thus the court finds that the package containing the ballots supposed to have been cast in precinct 4, Sacramento city, "was brought into court intact," and that the package supposed to contain the ballots cast at precinct 4½, Sacramento city, "was likewise in good order." And again: "From all the other precincts in the county the ballots are returned in good shape, not in every case complying strictly with the law, but there is not evidence indicating to my mind any tampering with the ballots."

The court below erred in assuming that the burden of proof was upon the defendant to prove that the ballots had been disturbed or fraudulently interfered with. Mr. Justice COOLEY says: "The returns of the canvassing boards are *prima facie* evidence in the courts. * * * If, however, the ballots have not been kept as required by law, and surrounded by such securities as the law has prescribed, with a view to their safe preservation, as the best evidence of the election, it would seem that they should not be received as evidence at all, or, if received, it should be left for the jury to determine, upon all the circumstances of the case, whether they constitute more reliable evidence than the inspector's certificate, which is usually prepared immediately on the close of the election, and upon actual count of the ballots as then made by the officers whose duty it is to do so." Const. Lim. side p. 625.

McCreary, in his work on Contested Elections, p. 209, lays down the rule: "Before the ballot-boxes should be allowed in evidence to overturn the official count and return, it should appear affirmatively that they have been safely kept by the proper custodian of the law; that they have not been exposed to the public, or handled by unauthorized persons, and that no opportunity has been given for tampering with them. If this is believed to be a rule founded upon a presumption that a fraud or crime has been committed, the answer is that the rule does no more than make choice between two presumptions of law, which in this instance come in conflict, and cannot both prevail."

In *People v. Livingston*, 79 N. Y. 290, the court of appeals held the trial court erred in charging the jury that, to justify the rejection of the ballots as proof, it must appear affirmatively, by direct evidence, or from circumstances, that the ballot-boxes had been interfered with and fraud committed, CHURCH, C. J., saying: "The error is in putting upon the party against whom the ballot-boxes are introduced, the *onus* of proving that they had in fact been tampered with. * * * The burden was upon the relator to satisfy the jury that the boxes had remained inviolate; the returns are the primary evidence of the result of the election. * * * The returns may be impeached for fraud or mistake, but in attempting to remedy one evil we should be

cautious not to open the door to another and far greater evil. After the election it is known just how many votes are necessary to change the result; the ballots themselves cannot be identified—they have no ear-marks. * * * Every consideration of public policy, as well as the ordinary rules of evidence, require that the party offering this evidence should establish the fact that the ballots are genuine. * * * If the boxes have been rigorously preserved, the ballots are the best and highest evidence, but if not, they are not only the weakest, but the most dangerous evidence. *The jury might not be satisfied with the proof of identity, and yet be unable to find from the evidence that actual tampering or fraud had been committed.*"

It is perfectly manifest that the court below failed to find directly upon the issue made by the pleadings—were the election boards guilty of malconduct in counting ballots for defendant which were not cast for him, and in failing to count ballots for plaintiff on which his name appeared? The fourth finding commences: "There was *no malconduct nor misconduct* upon the part of any of the officers who conducted such election, and no intentional miscalling or improper tallying or counting of the ballots cast for the office of county clerk, but such errors as were made resulted from mistakes and oversight, and are indicated by the following statements of the votes cast in each precinct," etc. Subsequently comes a statement of the returns from each precinct, and of the results arrived at by a recount of the ballots claimed to have been cast in each precinct. The court found there was no "malconduct nor misconduct." If this was a finding on the issue, the judgment should have been for defendant. But the court failed to find whether the election board in any precinct did or did not miscount the ballots. The findings, at most, suggest the *argument* that the election boards must have made mistakes *because* the recount showed that the boards must have made mistakes. But, as appears from the findings themselves, the results reached by the recount may not have been correct. And this, because the findings show that, in inquiring whether the ballots had been preserved inviolate, the court below lost sight of the rule, applicable to actions of this character, that the returns are to be received as true *prima facie*, and the ballots are not better evidence to overcome the returns, unless the contestant shall affirmatively prove that the ballots remained in the same condition as they were when delivered to the proper custody by the judges of election. It is not our function to express any opinion as to the *fact*; we say that the court below erred in applying the rule as to the burden of proof.

In *Coveny v. Hale*, 49 Cal. 552, was laid down the rule, followed ever since, that the findings must be either of the ultimate facts, or of such probative facts as that the court is enabled to say that the ultimate facts necessarily result therefrom. In the cause before us the court below failed to find the ultimate facts alleged and put in issue by the pleadings. And the argumentative finding does not sup-

port the judgment, since the conclusion that the election boards must have made mistakes because the result of the recount did not accord with the returns of the boards, is a *non sequitur*. We cannot decide that the results reached through the recount are correct, inasmuch as the court erred in assuming that the ballots had been undisturbed because it was not satisfied from the evidence that actual fraud had been committed.

Judgment reversed, and cause remanded for a new trial.

We concur: ROSS, J.; McKEE, J.

65 Cal. 50

SANDERS, Adm'r, v. SIMCICH, Ex'r, and others.

Filed February 12, 1884.

Where special issues are framed and presented to a jury, and the court is asked to receive evidence upon other issues raised in the pleadings upon which to prepare additional findings, it is error in the court to refuse the request.

Where an unmarried person makes a will and afterwards marries, the marriage, upon survival of wife or children, operates as a revocation of the will, unless some settlement is made by the will itself or by marriage contract provided for such survivors.

The appointment of an administrator to the "estate of A., surviving wife of B.," is no proof that A. survived B., especially where both perished in the same calamity; and the presumption in the present case would be that B. survived A. Sub. 4, par. 40, § 1963, Code Civil Proc.

Department 1.

C. R. Gray and D. B. Spagnoli, for appellant.

Eagon & Armstrong and A. Caminetti, for respondents.

McKEE, J. This case arises out of a proceeding brought by the administrator of the estate of Catterina Jelletich, deceased, against the executor of the estate of Nicholas Jelletich, deceased, to set aside the probate of a lost or destroyed will made by the said Nicholas in his life-time. At the hearing, certain special issues were framed and submitted to a jury that returned a special verdict substantially as follows: (1) That the said Nicholas Jelletich made the will in controversy; (2) that it had not been revoked; (3) that it had been admitted to probate upon sufficient proof; (4) that Catterina Jelletich, the wife of the said Nicholas, survived her husband; and (5) that the husband had in his life-time made provision for her by a marriage contract. This verdict was filed and entered on the minutes of the court, pursuant to section 625, Code Civil Proc. There were other issues, however, raised by the pleadings, which had not been submit-

ted to the jury, and upon them plaintiff's counsel asked the court to hear proofs upon which to prepare additional findings; but the request was denied, and upon the special verdict alone the court refused to revoke the probate of the will, and gave judgment accordingly. The refusal to take testimony, and to make findings upon the other questions at issue, was erroneous. Besides, the judgment and order denying the motion for a new trial are erroneous, because the special verdict does not support the judgment, and the evidence does not sustain the verdict.

The first finding by the jury is immaterial; the second and third are findings of law. It is admitted that the fifth finding is not sustained by the evidence; and the record shows that the court erred in its rulings, as to the only evidence upon which the fourth finding is based; and that the finding itself is not sustained by the evidence. It appears by the record that on June 20, 1879, Nicholas Jelletich made his will. At that time he was a widower, about 43 years of age. By the will he devised all his property, except a sum of money, to his then only son, John Jelletich, a boy 14 years old. Soon after making his will he left Amador county, where he resided, and went to Austria. There he married, and in October, 1878, returned to Amador county with his wife, Catterina Jelletich, who afterwards bore him two children. It does not appear that at the time of the marriage, or at any time thereafter, he made any provision for his wife by a marriage contract, and the will of June, 1878, contained no mention of her name, nor any provision for her or her children. He and his wife with the two children resided in Amador county until October 20, 1881. On that night his dwelling was burned, and he, his wife, and the two children perished in the fire.

The petitioner claims and the jury found that in that calamity the wife survived her husband. As a surviving wife, for whom no provision had been made by her husband in his life-time, and of whom no mention was made in his will to show that he did not intend to make any provision for her, the will, made before her marriage with him, was revoked by operation of law, (section 1299, Civil Code;) and the court should have instructed the jury to that effect. It is the policy of the law that wife and children must be provided for. Therefore the Civil Code declares that where an unmarried person has made a will and afterwards marries, the marriage, whether followed by the birth of issue or not, operates in case of the survival of wife or children, if any, as a revocation of the will, unless some specific provision has been made by the will itself or by a marriage contract, for the surviving wife, or by some settlement or provision for any surviving children of the marriage. Sections 1298, 1299, *supra*. The law presumes that the subsequent marriage of a testator has wrought such a change in his condition in life as to cause him to destroy or cancel a previous will; and does not admit of evidence to the contrary unless provision has been made according to law for wife

and children who have survived him. *Id.* The presumption of revocation, however, depends upon the question of survivorship. Survival of the children is not claimed; but the paramount question at issue was the survival of the wife. If the wife survived, under the conditions referred to, the will was revoked by law, and, as to her, the husband died intestate. If the husband survived, his will was valid and probatable. To prove survivorship of the wife, the petitioner gave in evidence the order of the probate court granting him letters of administration of the estate of Catterina Jelletich, deceased. That order was as follows: “* * * It is ordered that letters of administration of the estate of the said Catterina Jelletich, known under the name of Catterina Jelletich, deceased, the surviving wife of Nicholas Jelletich, deceased, be issued to the said petitioner, W. Boon Sanders, the public administrator of said Amador county, upon his taking the oath according to law. Dated October 30, 1882.”

In rebuttal the defendant offered to introduce evidence upon the question at issue, but, without requiring him to state what his evidence was, the petitioner objected to the introduction of any evidence upon the question, and the court sustained the objection. There was, therefore, no other evidence before the jury of the survival of the wife than the order of the probate court. And the ruling of the court in excluding any other evidence is sought to be maintained on the ground that the recital in the order, that the deceased Catterina was “the surviving wife of Nicholas Jelletich, deceased,” is conclusive, and estops the defendant from denying the fact. But the order only adjudged the right of the petitioner to letters of administration upon the estate of Catterina Jelletich, deceased. That adjudication, being made by a court that had jurisdiction of the estate, real or personal, of which the decedent died seized, would be, undoubtedly, in any controversy thereafter involving the question of administration, at least, *prima facie* evidence of the essential facts upon which it was made,—namely, the domicile and estate, death and intestacy of the decedent. But it would not be evidence that the decedent survived any other person to whom she may have borne in her life-time some domestic relation, because that was not a fact essential to the jurisdiction of the court, nor a question at issue in the proceedings for letters of administration. In that proceeding the question was not raised, tried, or determined. It was raised for the first time in this proceeding,—a proceeding entirely different from the one in which the order was made; and the question was provable, not by an order made in a proceeding in which it was not raised, but by evidence *aliunde*. *Garwood v. Garwood*, 29 Cal. 515; *Ferrea v. Chabot*, 11 Pac. Co. L. J. 514. As this order was the only evidence before the jury, upon which, by the rulings of the court, their verdict was founded, there was no evidence to sustain the finding. And it is against law. For “when two persons perish in the same calamity, and it is not shown who died first, and there are no particular circumstances from which

it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age, and sex, according to certain rules, one of which is: If both be over fifteen, and under sixty, and the sexes be different, the male is presumed to have survived." Sub. 4, par. 40, § 1963, Code Civil Proc.

Order reversed, and cause remanded for a new trial.

We concur: McKINSTRY, J.; ROSS, J.

2 Cal. Unrep. 264

PEOPLE v. MAJORS.

Filed February 12, 1884.

An appeal will not lie from a judgment upon a plea of former judgment of conviction, nor from an order denying a motion for a new trial.

Two men being murdered in furtherance of a conspiracy, each conspirator was guilty of the murder of each of the victims, and conviction of the killing of one is no bar to a prosecution for the killing of the other, even though both men were killed at the same time and place.

Department 1.

The Attorney General, for respondent.

J. B. Lamor, for appellant.

Ross, J. To an information filed August 27, 1883, charging the defendant with the murder of one Archibald McIntyre, in Santa Clara county, on the eleventh day of March, 1883, defendant, without a plea of not guilty, pleaded a former judgment of conviction of the same offense. Upon the plea so interposed a trial was had, and a verdict rendered for the people. Defendant then moved in arrest of judgment, and also made a motion for a new trial, both of which motions were denied by the court, and thereupon judgment was given against him on the plea. He appeals from the judgment, from the order denying his motion in arrest of judgment, and also from the order refusing him a new trial.

It is clear that there is no authority for the appeal from the judgment, nor for that from the order denying the motion in arrest of judgment. Sections 1237 and 1259 of the Penal Code read:

"Sec. 1237. An appeal may be taken by the defendant: (1) From a final judgment of conviction; (2) from an order denying a motion for a new trial; (3) from an order made after judgment, affecting the substantial rights of the party.

"Sec. 1259. Upon an appeal taken by the defendant from a judg-

ment, the court may interview any intermediate order or ruling involving the merits, or which may have affected the judgment."

Such orders and rulings made prior to the judgment, and involving the merits, or which may have affected the judgment, from which an appeal is not in terms given, can only be reviewed on appeal from the final judgment of conviction. *People v. Clarke*, 42 Cal. 622. Section 1237 does not give an appeal from an order denying a motion in arrest of judgment. The appeal from the order is therefore without authority, and must be dismissed. So, too, with respect to the appeal from the judgment upon the plea of former conviction. It is obvious that such a judgment is not "a final judgment of conviction." It only determines that the defendant has not been previously convicted of the offense of which he now stands charged, leaving the question of his conviction or acquittal open, to be determined after a trial.

The appeal from the order denying defendant's motion for a new trial of the issue raised by his plea of former conviction, remains to be considered. On the trial of that issue it was made to appear in evidence that the defendant was a defendant to an information filed in the same court on the thirty-ninth of March, 1883, charging Joseph Jewell, John Showers, and Lloyd L. Majors with the murder of one William P. Renowden, in the county of Santa Clara, on the eleventh of March, 1883; that under that information defendant was duly convicted and adjudged guilty of murder in the first degree, and sentenced to life imprisonment in the state prison; that the facts established by the evidence given on that trial, and upon which defendant was convicted, were: "That said Lloyd L. Majors counseled and advised one Joseph Jewell to rob one William P. Renowden, living near Lexington, in the said county of Santa Clara, on the eleventh day of March, 1883; that on said day said Jewell repaired to said Renowden's home, taking with him one John Showers; that said Jewell and Showers unexpectedly found at the house of said Renowden one Archibald McIntyre, who was then residing with said Renowden; that, in the attempt to carry out the design of robbery, both said Renowden and said McIntyre were then and there, at the same point of time, to-wit, about 6:30 o'clock p. m. of the eleventh day of March, 1883, killed by said Jewell and Showers; that said Majors was not present; neither did he personally participate in the said act of killing said Renowden and McIntyre, or either of them, except counseling and advising said Jewell to commit said robbery as aforesaid;" and it was further made to appear in evidence in the court below, that the facts above recited "are to be adduced and proven in support of the information now pending, to which the said Lloyd L. Majors has pleaded a former conviction, should the same be put in issue by a plea of not guilty."

The proposition of appellant's counsel is that as Renowden and McIntyre were killed at the same place, and at the same point of time,

by Jewell and Showers in the attempt to rob Renowden, the killing "was, on the part of Jewell and Showers, one physical act,—one mental effort," and therefore a conviction for the murder of Renowden bars a prosecution for the murder of McIntyre. For the purposes of this case we need only say that we do not find counsel's premise supported by the facts disclosed by the record. Because Renowden and McIntyre were killed by Jewell and Showers at the same place, and at the same point of time, it by no means follows that their death was caused by "one physical act,—one mental effort." As is well said by the district attorney, Showers may have brained one with a shot-gun, in the house, while Jewell shot the other with a pistol through the heart, in the yard. Both were murdered in the execution of a conspiracy entered into for the purpose of robbing one of them. The act of each conspirator in furtherance of that design was the act of each and every of the others. Each was guilty of the murder of each of the murdered men, and, of course, subject to prosecution therefor. We think this very clear.

Appeal from the judgment and from the order denying the motion in arrest of the judgment, dismissed, and order denying the defendant's motion for a new trial affirmed.

We concur: McKINSTRY, J.; McKEE, J.

2 Cal. Unrep. 267

LAWRENCE v. GETCHELL.

Filed February 12, 1884.

Where the action involves the title of the land described in the pleadings, and the court decides that the plaintiff has no cause of action against the defendant, the defendant is entitled to his costs and disbursements in the action.

Department 1.

Cross & Simmonds, for appellant.

W. D. Long and *J. M. Walling*, for respondent.

McKEE, J. This was an action to determine the title of the plaintiffs to certain parcels of land described in the complaint, and to enjoin the defendant from trespassing upon the same, and from asserting any title thereto. The court found that the plaintiffs were owners of only a portion of the land, and that they were not entitled to any relief. Upon this finding a temporary injunction, which had been issued in the case, was dissolved, and judgment was entered in favor of defendant "for costs and disbursements incurred on account of

the injunction, taxed at \$17.80," and also in favor of the plaintiffs against the defendant "for their costs and disbursements incurred in the trial of the issue of title to the real property described in the pleadings in the case, taxed at \$467.25." The defendant moved to modify the decision and judgment by striking out the said judgments, and inserting in lieu thereof the following: "That the defendant is entitled to judgment for his costs and disbursements incurred in this action." This the court refused to do, and, we think, the refusal was error. For, as the action invoked the title of the plaintiffs to the land described in the pleadings, and the court decided that the plaintiffs had no cause of action against the defendant, the defendant was entitled, of course, to judgment for his costs and disbursements incurred in the trial of the action. Section 1024, and sub. 5, § 1022, Code Civil Proc.

Order reversed and cause remanded, and court is directed to modify its decision and judgment as requested.

We concur: MCKINSTRY, J.; ROSS, J.

65 Cal. 56

WEBB v. CLARK.

Filed February 12, 1884.

Payment of the taxes assessed upon land during the claimant's occupancy of it, is necessary to establish adverse possession. Section 325, Code Civil Proc.

Department 1.

B. Ashurst, for appellant.

Jerome Banks, for respondent.

BY THE COURT. Ejectment, wherein plaintiff established in himself a right of entry to the land in dispute at the commencement of the action, and defendant attempted to bar the right by proof of five years' adverse possession from the time of his entry on the land, in 1876. But, as a witness on his own behalf, he testified that he had not, at any time during his occupancy of the land, paid the taxes which had been levied and assessed upon it, as required by section 325, Code Civil Proc., to establish adverse possession. Yet there was a verdict in his favor, which the court below, on motion for a new trial, refused to set aside. This was error. *C. P. R. Co. v. Shackelford*, 11 Pac. C. L. J. 164.

Judgment and order reversed, and cause remanded.

SUPREME COURT OF CALIFORNIA.

65 Cal. 57

HAMILTON v. TUTT.

Filed February 12, 1884.

Where no bond is given sufficient under the statute to stay execution, the plaintiff is entitled to have the execution issue. The duty of issuing it is a ministerial one, enjoined upon the justice of the peace; and in case of refusal a writ of mandate from the superior court is the proper remedy.

Department 1.

Garontle & R. Clark, for respondent.

Ball & Craig and *B. A. Hudson*, for appellant.

Ross, J. We see no ground for saying that the judgment of the justice's court, in the action of *Hamilton v. Levy & Anderson*, was void. That was an action for the recovery of \$100 damage, alleged to have been occasioned by the trespassing of certain sheep of the defendants upon land of the plaintiff in the action. In response to a summons, the defendants to the action appeared and answered the complaint; a trial was had before a jury, which rendered a verdict for the plaintiff, on which the court entered judgment in favor of the plaintiff against the defendants. On the appeal subsequently taken from the judgment by the defendants, a bond sufficient under the statute to stay execution was not given. The plaintiff to the suit was therefore legally entitled to an execution to enforce the payment of the amount adjudged him. The issuance of such an execution on the part of the justice of the peace called only for the exercise of the ministerial function; and being one specially enjoined on him by the law, as a duty resulting from his office, and he having refused to issue the writ, and the petitioner having no plain, speedy, and adequate remedy for such refusal in the ordinary course of law, the superior court rightly awarded him a writ of mandate.

Judgment and order affirmed.

We concur: McKEE, J.; McKINSTRY, J.

(2 Cal. Unrep. 268)

FABER v. CATHRIN.

Filed February 12, 1884

A land-owner being injured by the trespass of sheep in possession and care of defendant, the latter, under the evidence herein, is liable therefor.

Testimony showing that by reason of the injury the plaintiff's stock had to be fed with hay, goes only towards showing the extent of the injury, and is properly admitted.

Department 1.

C. F. Irwin, for appellant.

Geo. G. Blanchard, for respondent.

Ross, J. This action was brought under the act of the legislature, approved March 7, 1878, and entitled "An act concerning trespassing of animals upon private lands in certain counties in the state of California." St. 1877-78, p. 176. The act is made applicable to the township in which is situated the land of the plaintiff, and its first and second section are as follows:

"Section 1. It is unlawful for any animal, the property of any person, to enter upon any land owned by or lawfully in the possession of any person other than the owner of such animal."

"Sec. 2. The owner of, or person who is in the lawful possession of, any land trespassed upon, in violation of this act, is entitled to recover by action, in a court of competent jurisdiction, from the owner of, or person in possession of, or person charged with the care of, the trespassing animal or animals, all damage sustained by reason of such trespass, together with costs of suit."

The complaint charges that at certain stated times the plaintiff was the owner and in the possession of a certain piece of land; that at those times the defendant was the owner, in the possession, and chargeable with the care of certain sheep, which sheep then entered and trespassed upon the land of the plaintiff and injured and destroyed the grain, hay, and grass thereon being and growing, to the plaintiff's damage in the sum of \$1,000. If the averments made by the plaintiff were true, the law quoted made the defendant liable to her. And that the averments were true, except as to the amount of damage sustained by the plaintiff, was found by a jury upon evidence sufficient to sustain the verdict. The fact that the damage done to the plaintiff by defendant's sheep had made it necessary for the plaintiff to feed her own stock with hay was first brought out by defendant on the cross-examination of one of the plaintiff's witnesses. Besides, there was no attempt on the part of the plaintiff to show the value of the hay so fed to her stock, and the testimony could only have

gone towards showing the extent of the injury done by defendant's sheep to the plaintiff's hay and grain.

In view of the evidence in the case, there was no error on the part of the court in refusing the instructions requested by the defendant. Judgment and order affirmed.

We concur: MCKINSTRY, J.; MCKEE, J.

(65 Cal. 46)

SMITH v. COOLEY.

Filed February 12, 1884.

The working of a mine under a bare "mining right" is considered, in equity, a species of trade; a particular estate or incorporeal hereditament in the land is conveyed, of which the grantor holds the general estate. The right is usufructuary in its character, and is not in its nature capable of partition.

A grant of the water rights, reservoirs, etc., for the purpose of working the ore, does not convey exclusive dominion of any portion of the ground, so as to make the grantee a joint tenant, or tenant in common, with the grantor.

Department 1.

C. F. Irwin, for appellant.

Geo. G. Blanchard, for respondent.

MCKEE, J. Plaintiff in the action, out of which this case arises, being the owner in fee of a tract of land in El Dorado county known and described as the N. W. corner of the N. E. $\frac{1}{4}$ of section 9, in township 10 N., range 9 E., Mount Diablo base and meridian, on the twenty-sixth of July, 1875, granted to the defendant an interest therein by the following description, namely: "An undivided third interest in a certain piece of mining ground situated in White Oak township, county of El Dorado, state of California, on the north-west quarter of the north-east quarter of section 9, township 10 north, range 9 east, Mount Diablo base and meridian," (said "mining ground" being also more particularly described by metes and bounds;) "together with the water rights, reservoirs, and tail-race belonging to the same; and it is expressly conditioned that this instrument conveys no other rights, except a mining right, on the premises above to the said party of the second part, his heirs or assigns."

After the execution and delivery of the grant, plaintiff and defendant, for about four years, worked the "ground" in partnership on the basis of two-thirds to the plaintiff and one-third to the defendant, but after the expiration of the four years plaintiff gave notice to the defendant that he would not be responsible for any expenses incurred in

working the ground, and the defendant has since continued to work it for himself. Under these circumstances plaintiff commenced the action in hand for a partition. Partition may be had of real property, held and occupied by several persons as coparceners, joint tenants, or tenants in common, according to their respective rights and interest in it, whether the estate which they own therein be an estate of inheritance or for life or lives or for years. Section 752, Code Civil Proc. But in the land itself, described in the deed under which defendant derives his right, the defendant was not a coparcener, joint tenant, or tenant in common. The deed only vested in him a particular estate; *i. e.*, the right of taking from the land any minerals or ores in place in it, to the extent of the interest in them granted to him.

A "mining right" upon a specific piece of ground is a right to enter upon and occupy the ground for the purpose of working it, either by underground excavations or open workings, to obtain from it the minerals or ores which may be deposited therein. By implication the grant of such a right carries with it whatever is incident to it, and necessary to its beneficial enjoyment. *Clark v. Duval*, 15 Cal. 85; *Cave v. Craft*, 53 Cal. 135. In addition to that implication the grant, in this instance, conveyed an interest "in the water rights, reservoirs, and tail race" on the mining ground. But it did not convey the exclusive dominion of any portion of the ground so as to make the grantee a joint tenant, or tenant in common, with the grantor. It conveyed only a particular estate, or incorporeal hereditament, in land of which the grantor held the general estate. This particular estate or incorporeal hereditament is what is known in law as a servitude "in gross," or a personal servitude, imposed upon land for the benefit of the person or persons owning the right, irrespective of the ownership of the land. The right is usufructuary in its nature and character, and entitles the owner to the use of the land for the profits which may be derived from its rents, or from quarrying and digging it for ores, or from harvesting its fruits, crops, and vintages, etc. Sections 802-806, Civil Code. As an incorporeal hereditament, it is subject to the general rules which govern the enjoyment of real property, and to the laws of descent, devolution, and transfer by act of law, according to the freehold or chattel interest acquired in it; but it is not in its nature capable of partition, because a division of the right would enlarge the original grant beyond the intention of the grantor, and likewise prove a greater charge than was originally intended to the owner of the soil, (*Bac. Abr.* 359;) and because so long as the minerals and ores, which are the subject of the servitude, are in place, unworked, and unsevered from the soil, they are incapable of allotment, according to quality and quantity, relatively considered. Section 764, Code Civil Proc.

Hughes v. Devlin, 23 Cal. 501, is not in conflict with this conclusion. The land sought to be partitioned in that case was a "mining
v.2,no.5—56

claim," which the court held was the subject of partition, the same as other real property. But why? Because, as was said in *Merritt v. Judd*, 14 Cal. 59, "our courts have given mining claims the recognition of legal estates of freehold; and, as to all practical purposes, if we except some doctrine of abandonment, not, perhaps, applicable to such estates, they unquestionably are."

The working of a mine under a bare "mining right" has been uniformly considered by courts of equity as a species of trade. Hence the legal relations existing between two or more persons interested in such a right is that of a qualified partnership; and the remedies relating to a mining partnership are available for the assertion or violation of any right arising out of it. Section 684 and chapter 4, tit. X, Civil Code; *Rich v. Davis*, 6 Cal. 164; *Duryea v. Burt*, 28 Cal. 569; *Settembre v. Putnam*, 30 Cal. 490.

Judgment affirmed.

We concur: McKINSTRY, J.; ROSS, J.

(65 Cal. 63)

GILMORE v. AMERICAN CENT. INS. CO.

Filed February 13, 1884.

A party bringing suits against two insurance companies, it was stipulated by the respective attorneys that upon a final determination in the first suit a similar judgment should be entered in the second. A motion for judgment pursuant to the stipulation is not a trial on the merits; if a party is entitled to judgment it is upon the stipulation and not on the merits. A motion for a new trial is therefore irregular, and should be dismissed.

While proceedings are pending for the review of a judgment, either on appeal or motion for a new trial, the litigation on the merits is not ended and there is not a final determination of the rights of the parties, even if it become final as to an appeal therefrom.

A reversal of a judgment prematurely entered as a stipulation does not prejudice the right to move for a judgment pursuant to the stipulation.

Department 1.

Gray & Haven, T. C. Van Ness, and Gardner & Stevens, for appellant.

J. Brunson & Wells, for respondent.

McKEE, J. Pending two actions in the Seventeenth judicial district court of Los Angeles county,—one of which was entitled *Lucy Gillmore v. The Lycoming Fire Insurance Company of Muncy, Pennsylvania*, and the other, *Lucy Gillmore v. The American Central Insurance Company of St. Louis*,—each of which was brought upon a policy

of insurance to recover for loss by fire, the attorneys of the respective parties, in the last-named action, entered into the following stipulation, which was filed and entered upon the court minutes as an order of the court, viz.:

"This cause being called regularly for trial, the parties appearing by their respective attorneys, and both parties consenting in open court that the issues in this cause are identical with those of the other action pending in this court, No. 4,799, entitled *Lucy Gillmore v. The Lycoming Fire Insurance Company, of Muncy, Pa.* It is stipulated and agreed that all proceedings herein shall be stayed until final judgment and decision in said action wherein the Lycoming Fire Insurance Company, of Muncy, Pa., is defendant, and in case of an appeal in said last-named action, then said proceedings are stayed until the final determination of such appeal, and upon such final determination, judgment, and decision in said action, wherein said the Lycoming, etc., is defendant, either party, without notice, shall and may cause to be entered a judgment in this action corresponding to and like the said final judgment, and of the same date, in said other action; and if such judgment shall be for the plaintiff, the amount for which the same shall be entered shall be \$650 and costs; and if for the defendant, then for its costs, allowed by law.

"An order pursuant to this stipulation shall be entered in the minutes of this court, twelfth May, 1879."

The action named in the stipulation was tried and decided in favor of the plaintiff, but the defendant moved to set aside the judgment entered therein, and for a new trial. The motion was denied; and from the judgment and order denying the motion the defendant appealed. On appeal, the judgment and order were reversed and the cause remanded, with directions to the court below to sustain the demurrer to the complaint in the action, with leave to the plaintiff to amend. In obedience to the direction of the appellate court, the demurrer to the complaint was sustained; the plaintiff amended her complaint, and the cause was again tried and decided in favor of the plaintiff, and judgment was entered in her favor against the defendant on March 14, 1881. A year elapsed, and no appeal from the judgment was taken. Then the attorneys for the plaintiff in this action, in which the stipulation was filed, moved the court to enter judgment in favor of the plaintiff pursuant to the stipulation; and the court on the seventeenth of March, 1882, rendered and entered judgment accordingly. The present appeal is from this judgment, and also from an order denying a motion to vacate it. There is also an appeal from an order denying a motion for a new trial.

It is contended that the judgment in the action of *Lucy Gilmore v. The Lycoming Insurance Company, of Muncy, Pennsylvania*, became final, within the meaning of the stipulation, after a year had elapsed from its entry without taking an appeal from it. But although no appeal had been taken from the judgment within statutory time, pro-

ceedings were pending upon a motion made by the defendant in the case to vacate the judgment and grant a new trial. That motion subjected the judgment to be reviewed, and made it liable to be set aside. The judgment was therefore not final, in the sense of the stipulation as to the right of the parties affected by it, and could not become so until the motion for a new trial had been disposed of. *Hills v. Sherwood*, 33 Cal. 474. While proceedings are pending for the review of a judgment, either on appeal or motion for a new trial, the litigation on the merits of the case between the parties is not ended; and until litigation on the merits is ended there is no finality to the judgment in the sense of a final determination of the rights of the parties, although it may have become final for the purpose of an appeal from it. As, therefore, the motion for a new trial in the *Lycoming Insurance Company Case* was not heard and determined until more than nine months after the entry of the judgment appealed from, the judgment was prematurely entered. If, now, no appeal has been taken from the order denying the motion for a new trial, in consequence of which the order has become absolute and the judgment final, the reversal of the judgment prematurely entered on the stipulation will not prejudice the right to move for judgment pursuant to the stipulation. A motion for judgment pursuant to stipulation cannot be considered a trial on the merits. If a party to such stipulation is entitled to judgment, it is upon the stipulation, which has been entered as an order of the court, and not upon a trial of the case. The motion for a new trial was therefore irregular, and should have been dismissed.

Judgment and order reversed, and cause remanded for further proceedings.

We concur: MYRICK, J.; MCKINSTRY, J.

(65 Cal. 67)

MEYER v. PORTER.

Filed February 13, 1884.

A provision in a city charter, that the city shall not be sued upon bonds issued by it, is no answer to a proceeding by *mandamus* to compel an officer of the city to perform a duty, in connection with the bonds, enjoined upon him by the law under which they were issued.

In regard to the bonds in question, it is the duty of the treasurer to pay them upon maturity out of the fund provided for that purpose, and no warrant is necessary therefor, nor need the coupons be presented to the board of trustees and auditor for examination and audit. The bonds, not being barred by the statute of limitations, the coupons are not.

Department 1.

Rosenbaum & Sheeline, and S. C. Denson, for appellant.

W. A. Anderson and J. H. McKune, for respondent.

McKEE, J. Application for a writ of mandate to compel the treasurer of the city of Sacramento to pay, out of funds in the city treasury, certain past due and payable coupons, belonging to bonds issued by the city of Sacramento, of which the plaintiff is the owner and holder. The fund out of which payment is demanded is known as the "interest and sinking fund" of the city of Sacramento. It is admitted there was in that fund, when the coupons were presented and payment demanded, the sum of \$100,000, yet the treasurer refused to pay, and the court below sustained him in his refusal. The coupon bonds in the hands of the petitioner were issued under a charter granted to the city in April, 1858. That charter empowered the municipal authorities to issue bonds for the past indebtedness of the former city government, and to set apart and appropriate 55 per cent. of the municipal revenue, when paid into the treasury, "to an interest and sinking fund, which shall be applied to the payment of the annual interest, and the final redemption of bonds issued for city indebtedness, in accordance with the provisions of this act." Sections 34, 35, St. 1858, p. 279. The bonds were therefore issued under a law which provided for their redemption as they became due, with interest thereon, payable annually until redeemed. But the charter also provided that "the city and county shall not be sued in any action whatever; nor shall any of its lands, buildings, improvements, property, franchises, taxes, revenue, actions, choses in action, and effects, be subject to any attachment, levy or sale, or any process whatever, either mesne or final." Section 1, *Id.*

In 1863 the charter of 1858 was repealed and a new charter substituted. The repeal of the old charter did not impair the validity of contracts made under its provisions. In fact, the substituted charter of 1863 contained the same provision for an "interest and sinking fund" for the payment of the annual interest of the bonds and of their redemption as that contained in the repealed charter; and it also contained an implied prohibition against suits or actions against the city upon any bonds which had been issued under the former charter. Therefore, it is contended that by both the original and substituted charters the holders of these city bonds took and held them with notice that no actions upon them could be maintained against the city. But however that may be, it is no answer to a proceeding by *mandamus* against an officer of the city to compel the performance of a duty, in connection with the payment of the bonds, which the law, under which they were issued, has specially enjoined upon him. *Meyer v. Brown*, 12 Pac. C. L. J. 153. If, therefore, it was the clear, legal duty of the treasurer to do the act demanded of him, performance of it can be compelled; and the only question is, was it the duty

of the treasurer to pay the coupons, when presented to him, out of the fund which he had on hand? That fund contained \$100,000, and the moneys had been set apart and appropriated for the purpose of the payment of the annual interest and final redemption of the bonds. St. 1858, p. 279; St. 1863, p. 426. The interest was made payable at the office of the treasurer on the first day of January of each year, (section 37, St. 1858, p. 280;) and says section 40 of the same statute: "It shall be the duty of the treasurer to pay the interest on said bonds when the same falls due out of said interest fund as provided in this act." Thus the duty to pay is specially enjoined upon the officer. It is a special duty with regard to the bonds which is imperative upon him over and beyond the ordinary duties of his office as prescribed by other provisions of the charter, ordinances, or orders of the municipal authorities. Being a special duty, no other statute, ordinance, or order was requisite for its performance.

Nor was it necessary that the coupons should have been presented to the board of trustees and auditor for examination and audit, as ordinary accounts or claims against the city, under the provisions of sections 2, 5, 8, and 9 of the act of 1863; for as the law under which they and the bonds to which they belonged were issued made it the duty of the treasurer to pay them in the manner and out of the fund provided for that purpose, no warrants were necessary to authorize their payment. Nor is the fact, if it exists, that there are other creditors interested in the fund provided for their payment, who have not demanded payment, any answer to the application of the petitioner. Non-action by others having equal rights with him, in a matter on which his right is founded, cannot prejudice him in the assertion of his right nor excuse non-performance of a duty in connection with it specially enjoined by law. And as the coupons partake of the nature of the bonds to which they belong, and against which the statute of limitations had not run, they were not barred by the statute.

Judgment reversed and cause remanded.

We concur: ROSS, J.; MCKINSTRY, J.

WHITCOMB *v.* McCLINTOCK.

Filed February 13, 1884.

Department 1.

L. S. Taylor, for appellant.

Jones & Martin, for respondent.

BY THE COURT. On the authority of *Norton v. Zellerbach*, 11 Pac. C. L. J. 356, judgment reversed, and cause remanded for a new trial

CANAVAN v. MUNICIPAL COURT OF APPEALS.

Filed February 14, 1884.

In Bank.

John H. B. Wilkins and *D. H. Regensburger*, for appellant.

M. C. Hassett, for respondent.

BY THE COURT. Upon the authority of *Davis v. The Superior Court*, 11 Pac. C. L. J. 568, judgment reversed, and cause remanded for further proceedings.

65 Cal. 71

GREEN v. ODD FELLOWS' SAVINGS & COMMERCIAL BANK.

Filed February 15, 1884.

Where one bank assigns to another all its property, on condition of assuming all the debts and liabilities, the bank accepting the assignment assumes towards the creditors of the assignor the precise relation that the assignor bore.

The plaintiff's claim is properly considered as a deposit, and in case of money deposited in a bank there is in this state no limitation to an action therefor.

Department 1.

G. Cadawallader and *R. T. Devlin*, for appellant.

Catlin & Hamburger, for respondent.

Ross, J. On the first day of March, 1875, the Odd Fellows' Bank of Savings was indebted to the plaintiff in the sum of \$3,000 for moneys at and before that time deposited with it. On the day mentioned that bank conveyed all of its property to the defendant upon the consideration and agreement that defendant would accept, take, and receive the same and assume and pay all the debts and liabilities of said Odd Fellows' Bank of Savings, including the demand of the plaintiff. Defendant accepted the property of the Odd Fellows' Bank of Savings, assumed all of its debts and liabilities, and thereupon commenced to carry on, and until some time in September, 1878, continued to carry on, the business of a savings and loan corporation. In March, 1875, the plaintiff assented to and ratified the transfer to the defendant and released said Odd Fellows' Bank of Savings from his demand. On the tenth day of July thereafter, the defendant credited the plaintiff with a dividend of \$135 for and on account of the use of the aforesaid sum of \$3,000 by defendant and by the Odd Fellows'

Bank of Savings, for the six months then next preceding, and on the twenty-sixth of July, 1875, defendant paid plaintiff on account of said debt and dividend the sum of \$1,135. That payment left due the plaintiff from defendant \$2,000. If that sum is to be regarded as a deposit by plaintiff with defendant, the judgment of the court below should be affirmed, regardless of any other question; for the defense here is the statute of limitations, and to an action brought to recover money deposited in any bank, there is in this state no limitation. Code Civil Proc. § 248; *Mitchell v. Beckman*, 10 Pac. C. L. J. 742. When the defendant succeeded to the business of the Odd Fellows' Bank of Savings and accepted the conveyance of all of its property, and in consideration of that conveyance assumed all of its debts and liabilities, including the demand of the plaintiff, and credited plaintiff in its books of account with said sum of \$3,000 as a deposit, as the court below found that it did so, we think defendant assumed towards plaintiff the precise relation that its assignor bore. And that such was the relation recognized by the defendant is shown by the further fact of the subsequent payment to plaintiff of a dividend upon the deposit accruing partly before and in part subsequent to the transfer from the Odd Fellows' Bank of Savings.

We must affirm the judgment.

Ordered accordingly.

We concur: McKINSTRY, J.; McKEE, J.

ROEDING v. PORTER.

HAUSMEISTER v. SAME.

Filed February 15, 1884.

Department

Rosenbaum & Sheline and *S. C. Denson*, for appellants.

W. A. Anderson, City Atty., and *J. H. McKune*, for respondent.

BY THE COURT. Upon the authority of *Meyer v. Porter*, ante, 884, judgments reversed, and causes remanded.

64 Cal. 443

HALL v. RICE, Adm'r.¹

Filed February 15, 1884.

Department 1.

W. B. Treadwell, for appellant.*J. Lambert*, for respondent.

BY THE COURT. Ordered that the following portion of the opinion herein be stricken out: "Otherwise the party demanding a conveyance is without remedy, since he cannot appeal from the order of the probate court. Code Civil Proc. 963."

65 Cal. 73

ANTHONY v. CHAPMAN.

Filed February 18, 1884.

An express declaration in a deed, that the money was paid by the grantee named therein, may be controlled by parol proof alone, but such evidence must be full, clear, and satisfactory.

Admissions made by an administrator in the course of judicial proceedings, are for the benefit of the estate, and do not conclude his individual right by way of estoppel.

An authenticated copy of a recorded deed is *prima facie* evidence of the genuineness, and due execution of the original.

In Bank.

Moore, Laine & Johnston, for appellants.*Burt & Pfister*, for respondents.

SHARPSTEIN, J. The most important question presented by the record is whether the finding, that the consideration for the conveyance from Bird to Mary A. Smith was furnished by J. P. Smith, is justified by the evidence. The deed recites that the consideration was paid by Mary A. Smith, the grantee therein; and while the express declarations of the deed in that respect may be controlled by parol proof alone, it is well settled that such evidence must be full, clear, and satisfactory. Nothing appearing to the contrary, the presumption is that the consideration was paid by the grantee in the deed; and while this presumption may be overcome by parol evidence, to pro-

¹S. C. 1 PAC. REP. 891.

duce that result such evidence must be of the character above stated. In this case there is no direct evidence that the purchase price of the demanded premises was paid by J. P. Smith, or that the money paid therefor had ever belonged to him. There is evidence tending to prove that he was at one time possessed of means sufficient to pay said purchase price, and that Mary A. Smith was not. But there is no clear or positive evidence of this. Aside from evidence of her circumstances before she came to this coast, there is nothing beyond what some of the witnesses testify to her having said to them in loose conversation, more or less remote from the date of said purchase, to indicate that she was not able to pay for it with her own money. In *Willis v. Willis*, 2 Atk. 71, it is said: "There is another way of taking a case out of the statute, and that is by admitting evidence within the rules laid down by this court, to show the trust, or the mere circumstances of the pretended owner of the real estate or inheritance, which makes it impossible for him to be the purchaser." But there is nothing in the evidence introduced by the defendant which makes it appear impossible or even incredible that Mary A. Smith was the purchaser of the premises conveyed to her. It does not appear that any of the witnesses professed to be familiar with her circumstances, or to have stood in any such relation to her as would naturally make them conversant with her affairs.

One witness testified to conversations with Mary A. Smith, in which she said, "Smith had lost considerable money by not taking her advice. He then told her that in the future she might manage his business, as she had a better head than he had. * * * She said it was easier transacting business to have it done in her name. It was Mr. Smith's money that was used all the time. She said she never did anything, however, without consulting Mr. Smith. She never claimed to have the exclusive ownership of the property." It does not appear at what time this conversation was had, or that the property in controversy, or the purchase of it, was even alluded to in it. Another witness testified that Mary A. Smith told him "she had everything in her own name because, as a general thing, the women were smarter than the men." And, further, that she never conveyed the idea to him that it was her husband's money exclusively that bought the property; and he, witness, "supposed it belonged to both of them." It does not appear what property the witness alluded to. But he said: "After the purchase of the Bird tract we didn't have much talk."

After stating that in all cases of this character the facts "must be proved with great clearness and certainty," Mr. Perry, in his work on Trusts, says: "For this purpose all competent evidence is admissible, as the admission of the nominal purchaser and grantee in the deed, * * * and even circumstantial evidence, as that the means of the nominal purchaser were so limited that it was impossible for him to pay the purchase money. But loose and equivocal facts ought not to control the evidence of deeds." Section 137.

We are unable to find in this record any evidence of admissions made by Mary A. Smith that J. P. Smith furnished the money which was paid for the purchase of the demanded premises. Nor is it made clear by the evidence that her means were so limited that it was impossible for her to pay the purchase money. The facts relied on to establish her inability, as we view them, are "loose and equivocal;" clearly insufficient to overcome the evidence of the deed. This conclusion is based wholly on the evidence relied upon to establish a resulting trust. If there was a conflict of evidence as to who *actually* paid the purchase money of the property we could not disturb the finding on that question. But there is not. There is no direct evidence that Mary A. Smith did not pay it; or that her circumstances were such that she could not; or that she ever admitted that J. P. Smith paid it.

The alleged trustee and beneficiary are dead. Both died before the commencement of this action. And the evidence in support of the alleged trust consists mainly of verbal statements and admissions made by the alleged trustee. In *Kennedy v. Kennedy*, 57 Mo. 73, the court said: "That evidence of verbal statements and admissions alleged to have been made by a deceased person in regard to the ownership of the money which forms the basis of such trust is, unless supported by strong corroborative evidence, as, for instance, that the claimant's money was placed in the hands of the deceased for investment, wholly insufficient." Otherwise but little reliance could be placed in deeds.

The appellant contends that by representing in his petition for letters testamentary of the will of Mary A. Smith that said property belonged to her estate, and filing an inventory of her estate which included said property, J. P. Smith was estopped from afterwards claiming that it was his own. In *Carter v. McManus*, 15 La. Ann. 676, the court says "that admissions made by an executor or administrator in the course of judicial proceedings are made for the benefit of the estate represented by him, and do not conclude his individual right by way of estoppel." Another case very much in point is *Werkheiser v. Werkheiser*, 3 Rawle, 326. The facts in this case fall short of what is required to constitute an estoppel.

The objection to the introduction of a duly-certified copy of the record of a deed from Thomas Edmunds, Jr., to Robt. J. Bell, "on the ground that it was irrelevant and immaterial, and that there was no proof as to the genuineness, due execution or delivery of the original deed" was properly overruled. The authenticated copy of the record was *prima facie* evidence of the genuineness, due execution, and delivery of the original deed.

Judgment and order reversed.

We concur: MCKINSTRY, J.; MORRISON, C. J.; ROSS, J.; MYRICK, J.; THORNTON, J.

65 Cal. 77

PEOPLE v. WHEELER.

Filed February 19, 1884.

Upon examination and commitment by magistrate the district attorney is authorized to proceed against a prisoner by information.

Where a defendant having important interests in the case is witness in his own behalf, it is proper to charge the jury to consider the circumstances under which he testifies.

Department 2.

J. J. May, for appellant.

The Attorney General, for respondent.

MORRISON, C. J. Defendant was tried on an information for the crime of an assault, with a deadly weapon, with intent to commit murder. Verdict of guilty as charged; motion for a new trial and denial thereof; appeal from judgment and order denying new trial. Numerous errors are assigned on this appeal, which will be briefly examined by the court.

The first point is that there was error in the refusal to set aside the information. In our opinion the information was good and was filed in a proper case. There had been an examination and commitment of the defendant by a magistrate, and that was sufficient to authorize the district attorney to proceed against him by information. Const. art. 1, § 8.

2. The second assignment is that there was error in summoning a jury. We do not think the objection well taken. The court made an order directing the clerk "to draw the names of thirty-five good and lawful men," to be summoned, etc. This was a substantial compliance with the law, and the jury was properly formed. Sections 214, 215, Code Civil Proc.

3. In the third place, it is claimed that there was misconduct on the part of the district attorney. The record fails to show any such misconduct as would justify this court in disturbing the judgment.

4. The fourth objection, conceding that the same is well taken, is too slight and unimportant to call for a reversal of the judgment.

5. The fifth point presents an objection to the charge of the court on the subject of insanity. In reference to this objection, it is sufficient to say that there was no evidence that the defendant was insane.

6. The last assignment of error challenges another part of the charge. The defendant was a witness on his own behalf, and the court told the jury that in weighing his evidence they must consider the circumstances under which he testified, being the defendant in

the case and having such important interests dependent upon the result of the case. There was no error in this part of the charge, and it was very properly given. *People v. Morrow*, 60 Cal. 146.

Judgment and orders affirmed.

We concur: MYRICK, J.; SHARPSTEIN, J.; THORNTON, J.

65 Cal. 78

PEOPLE v. HOLLIS.

Filed February 20, 1884.

No appeal lies from an order in a criminal case dismissing the action for want of prosecution.

Department 1.

The Attorney General, for appellant,

Geo. W. Tyler, for respondent.

By THE COURT. The appeal is by the people from an order dismissing the action for want of prosecution. Such an order is not appealable. Penal Code, 1238. When an attempt is made to appeal from an order which is not appealable this court has sometimes stricken the cause from the calendar, because not brought here by the attempted appeal, and sometimes dismissed the formal appeal.

Appeal dismissed.

CALIFORNIA REPORTER

3 PACIFIC REPORTER

SUPREME COURT OF CALIFORNIA.

(2 Cal. Unrep. 270)

ROUGH v. BOOTH.¹

Filed February 23, 1884.

The petition and bond for removal, and order thereon, are not a part of the judgment roll, and the bond not being signed by the principal, it is insufficient. The judgment must therefore be affirmed.

Department 2.

W. H. H. Hart, for appellant.

H. B. Gillis and Calvin Edgerton, for respondent.

By THE COURT. The appeal in this case was taken from the judgment alone. On the appeal the plaintiff seeks to review an order of the court below denying his motion that the cause be transferred to the federal court. Under section 670, Code Civil Proc., the petition and bond for transfer, and the order thereon, do not constitute a part of the judgment roll, and there being no bill of exceptions, and no exception, we have nothing before us for consideration but the roll itself. Even if the proceedings for removal were before us for decision, we should consider the bond insufficient, it not being signed by the principal. This was one of the reasons stated by the court for denying the motion, and we think the ruling correct.

No error appearing, the judgment is affirmed.

ROUGH v. EMMONS.²

Filed February 23, 1884.

Department 2.

By THE COURT. On the authority of *Rough v. Booth*, *supra*, the judgment is affirmed.

¹ Reversed in banc. See 3 Pac. 805.
Cal.Rep. 1-4 P.—18

² Reversed in banc. See 3 Pac. 804, 65 Cal. 227.

55 Cal. 81

MATZEN v. SHAEFFER.

Filed February 25, 1884.

Where the purchaser at an execution sale takes, subject to an existing mortgage, any party in interest (not the principal debtor) may pay off the mortgage, and, even though it be discharged and satisfied of record, may keep the lien alive so far as is necessary for his equitable protection, as though he took merely an assignment of the mortgage.

The rights acquired by the purchaser at the execution sale are not affected by the assignment of the mortgage, either in fact or by operation of law.

Where there is no valid homestead in existence, an order of the court in insolvency proceedings setting one apart is a nullity.

Department 2.

J. H. McKune, for appellant.

Long, Lott & Belcher, for respondent.

SHARPSTEIN, J. It appears by the findings that it was arranged between the mortgagee, mortgagor, and appellant that she should pay the sum of \$3,500 for the satisfaction of the mortgage, and a conveyance to her of the mortgaged premises by the mortgagor. This entire sum was handed to the mortgagee, who retained the amount due on the mortgage, and gave the residue to the mortgagor. Whereupon the mortgagor executed a conveyance of the premises to appellant, and the mortgagee entered satisfaction of the judgment which he had previously obtained in an action to foreclose the mortgage. Previous to this the premises had been sold to the respondent under an execution issued upon a judgment recovered against appellant's grantor after the execution of the mortgage. But the time for redeeming the premises from said execution sale had not expired at the time of appellant's purchase. Since then respondent has received a deed from the sheriff who sold the premises to him under said execution. This presents a case in which the interests of the appellant required that the lien of the mortgage which she paid off should be kept alive. Her interests can only be fully protected by regarding the transaction in which she paid off the mortgage as an assignment of it to her, and the lien as being kept alive for her security and benefit. "In general, when any person having a subsequent interest in the premises, and who is therefore entitled to redeem, for the purpose of protecting such interest, and who is not the principal debtor primarily, and absolutely liable for the mortgage debt, pays off the mortgage, he thereby becomes an equitable assignee thereof, and may keep alive and enforce the lien so far as may be necessary in equity for his own benefit; he is subrogated to the rights of the mortgagee to the extent necessary for his own equitable protection." 3 Pom. Eq. Jur.

§ 1212. And this equitable result follows, "even though a receipt was given speaking of the mortgage debt as being fully paid, and sometimes even though the mortgage itself was actually discharged and satisfied of record." Id. § 1211.

If the respondent had purchased the premises while the satisfaction of the judgment of foreclosure remained of record he doubtless would be protected. But the findings show that he purchased the premises and received a certificate thereof before any action to foreclose the mortgage had been commenced, and that he was made a party defendant, and served with summons in said action. And if it be held that the appellant became the equitable assignee of the mortgage, and as such was entitled to have the lien created by it kept alive for her protection, notwithstanding the satisfaction and discharge of it of record, the respondent will be in no worse position than he would if the judgment of foreclosure had been *actually* assigned to appellant when she paid it off. The fact of the entry of satisfaction of the judgment could not have influenced him when he purchased the premises, because the action in which said judgment was entered had not then been commenced. He purchased the premises subject to the mortgage, and the rights which he thereby acquired could not be affected by an assignment of the mortgage, either in fact or by operation of law. We think this is one of the cases in which the satisfaction of a mortgage of record does not of itself prevent a court of equity from holding that the payment of it operated as an assignment of it to the person making the payment.

There is nothing to indicate that appellant, when she paid off the mortgage, intended to purchase it, or to have it kept alive for her benefit. It does not appear that anything was said on that subject. She paid it off, and the mortgagee, without her request, satisfied it of record. But the payment was made for her benefit, or for that of respondent. If the payment under the circumstances operated as an equitable assignment of the mortgage to her, she gets the benefit of it; otherwise, the respondent. Now, it is quite clear that she intended the payment of the mortgage should inure to her own and not to his benefit. She had in view her own and not his interest. And it is only by regarding the transaction as an assignment of the mortgage to her that her interests can be protected and maintained; and a court of equity will presume that it was intended she should reap the benefit of her investment. Equity regards that as done which ought to be done, and looks to the intent rather than to the form. There is no equitable ground on which the respondent could object to the mortgage lien being kept alive for the protection of appellant's interest; and the mortgage having been satisfied of record, when it should have been assigned to appellant, it was not error to vacate the satisfaction. And as the premises were regularly sold under said decree of foreclosure, and purchased at the sale by the appellant, who, after the time for redemption had expired, received a

deed, we do not doubt that her title to the premises is superior to that of the respondent, and that she is entitled to the relief prayed in her complaint.

The declaration of homestead filed by Kelley was not such as the law requires, in order to constitute a homestead; and there being no valid homestead in existence when the court in the insolvency proceeding made an order setting one apart for Kelley, such order was a nullity.

Judgment reversed, with directions to the court below to enter a judgment in favor of the plaintiff, as prayed in her complaint.

We concur: THORNTON, J.; MYRICK, J.

65 Cal. 79

PERSONS *v.* SHAEFFER.

Filed February 25, 1884.

Where a party takes a mortgage, and a previous lien on the land appears satisfied of record, and the mortgagee knows nothing of any equities on which such lien might be kept alive, it cannot be kept alive to the prejudice of such mortgage.

Department 2.

Gale & Jones, for respondent.

J. H. McKune, for appellant.

SHARPSTEIN, J. When the defendant executed the mortgages which this action was brought to foreclose, the judgment which Wilcoxson had obtained in an action to foreclose a prior mortgage was satisfied and discharged of record, and the court finds that the mortgagees of the subsequent mortgages had no notice or knowledge of any equities then existing in favor of Catherine Matzen, who paid the sum due on the Wilcoxson judgment. In *Matzen v. Shaeffer*, ante, 92, we held that, as between the parties to that action, the payment of the Wilcoxson judgment by Matzen operated as an equitable assignment of it to her, and that the lien was kept alive for her protection and benefit, notwithstanding it had been satisfied and discharged of record. The reasons for so holding are stated in the opinion filed in that case, and it is unnecessary to repeat them. But at the time of the execution of the mortgages in this case it appeared by the record that the Wilcoxson judgment had been satisfied and discharged, and it cannot be held that the mortgagees took subject to the lien of that judgment. Matzen, on paying it, had neglected to

have it assigned to her, and had suffered it to be and remain satisfied of record until after Shaeffer had executed these mortgages upon the premises. This presents a case in which either Matzen or these mortgagees must suffer from her neglect to act promptly, as she might have done in the matter of obtaining an *actual* assignment of the Wilcoxson judgment, or, failing in that, having the satisfaction of record vacated. She must suffer the consequences of her own neglect. The parties who took the mortgages under such circumstances must be protected. Equity as well as law requires that they should be. Her equities at the time were latent. She might or might not avail herself of them. The lien of the Wilcoxson judgment had been discharged. Equity might, under some circumstances, keep the lien alive, notwithstanding such discharge. But it certainly would not keep it alive to the prejudice of a party who had purchased the premises when it appeared of record that the lien had been discharged, and who did not have any knowledge of the equities, on which alone it could be kept alive after being discharged.

Judgment affirmed.

We concur: THORNTON, J.; MYRICK, J.

2 Cal. Unrep. 271

SHAEFFER v. MATZEN.

Filed February 25, 1884.

The legal title being only opposed by a mere naked possession, the holder of such title is entitled to the possession.

Department 2.

J. H. McKune, for appellant.

Long, Lott & Belcher, for respondent.

By THE COURT. The defendant Stillinger does not appear to have had any claim to the demanded premises beyond what his naked possession gave him; and at the time of the commencement of this action the plaintiff had the legal title, and was entitled to the possession of said premises. This is sufficiently apparent, although somewhat obscured by the finding of a great number of irrelevant facts.

Judgment affirmed.

65 Cal. 84

In re LORD.

Filed February 26, 1884.

Where no homestead has been set aside during the life of the decedent, the court must set apart one for the surviving husband, wife, or children out of the common property, and only when there is no common property can the selection be made from the separate property.

Where the court has no jurisdiction to select a homestead out of certain property, a sale of such property for homestead purposes is void.

Where separate property is set apart, it is set apart for a limited period only, and the title vests in the heirs, subject to the order of setting apart.

Where the only bond between several parcels of land is a mortgage over all, they may be divided, such mortgage not being a controlling element in making a homestead selection.

Department 2.

Sawyer & Ball, for appellant.*Fox & Ross*, for administratrix.

MYRICK, J. The deceased died intestate, leaving a widow surviving him, who became administratrix. His mother (the appellant) is his only other heir. The widow filed a petition that a homestead be set apart to her, none having been selected, designated, or recorded in the life-time of the intestate. She petitioned the court to set apart three parcels of land, viz.,—*First*, containing 115.98 acres, being farm land; *second*, containing 20 acres, being farm land; and, *third*, containing 1,055 acres, being swamp land. Her petition set forth that the said lands were mortgaged for \$5,000, on which some interest had accrued; that the two first-described tracts were community property, and had a dwelling-house and other improvements thereon; that the third described piece of land was the separate estate of the intestate; that the entire property was not worth to exceed \$5,000 above the mortgage; and that it had been appraised in the inventory of the estate at \$9,571. The petition prayed that the two first parcels be set aside as a homestead, or, in any case a partition could not be made, that the whole be sold, and out of the proceeds a homestead be set aside. Appraisers were appointed by the court, who reported the value of said lands, being three several tracts, as stated in the petition, at \$9,571; that the first described tract had a dwelling-house, with other improvements; that the two parcels, firstly and secondly described, are common property; and the piece thirdly described is separate property of decedent; that the premises could not be divided without material injury; and that the whole is incumbered with a mortgage for \$5,000 and some interest. Thereupon the widow filed another petition, setting forth the matters contained in

her first petition, the fact of the appraisal, and that the property could not be divided without material injury, and prayed for a sale of the property, and that out of the proceeds she be allowed \$5,000 in lieu of a homestead. The court fixed a day for the hearing of the petition, and, after hearing evidence, found the facts as above, among others, that the two first described parcels were community property and the other separate property of the deceased, and ordered the property to be sold in one parcel, subject to the mortgage, and that out of the proceeds, \$5,000, if so much should result, be set apart and designated as a homestead for the said widow, and that she retain the same for that purpose as her own property. A sale was made for \$5,444.20, cash, subject to the mortgage, and the sale was confirmed and a conveyance made. The administratrix filed her account, in which she charged herself with \$444.20 of the proceeds of said sale, and omitted to charge herself with the \$5,000. The appellant contested the settlement of the account, and, her objections being overruled, this appeal was prosecuted.

We have given the above full statement of facts in order to more clearly state the law applicable thereto. The statute is clear that if a homestead has been declared in the life-time of the deceased, and if it be appraised at more than \$5,000, and cannot be divided, the whole may be sold, and \$5,000 of the proceeds be set apart in lieu of the homestead claim. Evidently, the widow supposed the same course could be taken when no homestead had been declared, upon her petition, for what is called a probate homestead; and the court below seems to have agreed with her. It is not necessary, in this case, to decide that question, and we omit to do so.

The proceedings in this case, from and after the report of the appraisers, were irregular, and we very much doubt if any title passed to the purchasers. Referring to section 1465, Code Civil Proc., we find the direction, if no homestead has been selected, designated, and recorded, the court must select, designate, and set apart, and cause to be recorded, a homestead for the use of the surviving husband, or wife, or children (as the case may be) out of the common property, or, if there be no common property, then out of the real estate (separate property) belonging to the decedent. The selection must be made from the common property, if there be any; it can be made from the separate property only in case there be no common property. The statute, in this regard, is clear and explicit, and admits of no question. The petition of the widow stated that the two first-described parcels of land were common property, and that the third was the separate property of the decedent, and this is shown in all the subsequent proceedings. It appeared, then, on the face of the petition, and the subsequent proceedings, that the court had no jurisdiction to set apart a homestead out of or to include within a homestead a third parcel. If the court could not set apart the third parcel, it certainly could not sell it for homestead purposes. This is clear, to

a demonstration. The sale was not made to pay debts; its object is distinctly stated.

Again, the petition states that the real estate consists of three parcels, giving the acreage of each; the two first being farming lands, and having on one of them the dwelling-house and improvements, and the third being swamp land, and the appraisers so report, and the court so finds; yet the court finds and adjudges that these separate parcels could not be divided. Were it not for the allegation of the petition, and the statement in the findings, we might be bound by the findings of the court that they could not be divided; but with the allegation of the petitions and the facts as found, we cannot see how the conclusion at which the court arrived could have been supported by the evidence. It seems to us that the only bond between the three parcels is the mortgage over all, which is not a controlling element in making a homestead selection. A proper course for the court below to have taken would have been to proceed on the first petition to set apart a homestead out of or embracing the common property, which would have been subject to the mortgage; and the widow would then have been in condition to ask a sale of the balance of the property, and the application of the proceeds to the payment of the mortgage, under section 1475, Code Civil Proc., or, in case of foreclosure, to ask that the mortgaged property not set apart be first sold, and the proceeds applied, leaving the homestead liable for the balance only.

We suggest (and this is a suggestion merely) that, as the estate is still in process of administration, the court below may save the rights of the parties, including the purchasers, by setting aside all proceedings subsequent to the first petition, and let the money paid by the purchasers be returned, and then proceed to set aside a homestead according to law.

The proceedings in this case were taken under section 1465, Code Civil Proc., as amended in 1880. This section received a legislative construction in harmony with the views we have above expressed, by the amendment of section 1468, approved February 19, 1881, wherein it is provided that where separate property is set apart, it is set apart for a limited period only, the title vesting in the heirs subject to the order setting apart.

The order is reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

WE CONCUR: SHARPSTEIN, J.; THORNTON, J.

(65 Cal. 89)

BROWN, Adm'r, v. MULLIN.

Filed February 26, 1884.

The finding is not sustained by the evidence, and the cause remanded for a new trial.

Department 2.

Belcher & Belcher, for respondent.*C. W. Cross*, for appellant.

THORNTON, J. Whether China ravine had flowing in it, for more than eight years prior to the trial of this cause, a stream of natural water, is in our opinion immaterial, inasmuch as the defendant had ever since 1865 appropriated the waters of the ravine, and had partly used it for irrigation and partly sold it to be used, up to the time of the appropriation claimed to have been made by O'Connor, the intestate of plaintiff. This last appropriation did not take place earlier than 1873, and did not extend beyond the water which then flowed back into the ravine from the irrigation by defendant, or was suffered at that time to escape and flow in the ravine by defendant. In other words, it only extended to the water suffered to go to waste by defendant, as above stated. It is not claimed that this water ever exceeded forty inches—some times during the season it was less than five inches. The court found that the defendant was not the owner, or entitled to the use, of any natural water flowing down China ravine since 1878, when the quantity thereof was less than forty inches, measured under a six-inch pressure, when the same was used or wanted by plaintiff; and that plaintiff was the owner of said forty inches. The evidence did not sustain the finding. The right of plaintiff does not exceed what is indicated above. For this reason the order denying the new trial is reversed and the cause remanded.

We concur: SHARPSTEIN, J.; MYRICK, J.

(65 Cal. 87)

KELLEY v. FITZEL.

Filed February 26, 1884.

A finding of fact by the lower court on conflicting evidence will not be disturbed. An objection to testimony, as to the declarations of the plaintiff on the ground that it is not the best evidence, should not be sustained.

An error not prejudicial to the party objecting thereto is not ground for reversal.

Department 2.

C. G. Kelley, for appellant.

C. M. McCloskey, for respondent.

SHARPSTEIN, J. The plaintiff gave to the defendant an agreement in writing, of which the following is a copy:

"I hereby agree that H. G. Fitzell may take a fourth or fifth interest in the ditch-right he has this day conveyed to me, by being at his proportion of the expense on said ditch down to and through his lands.

"June 20, 1883.

G. F. KELLEY."

On behalf of plaintiff it is contended that this was simply a proposition which respondent never accepted. But the evidence on this point is conflicting. That introduced by respondent tended to prove that he did accept it, and aided in the construction of the ditch. Under these circumstances we cannot disturb the finding of the court below on that question.

On the trial the wife of plaintiff was called by him as a witness, and asked to state a conversation between her husband and defendant—to state all of the conversation. Defendant's counsel objected to her stating what plaintiff said as not the best evidence. The court sustained the objection, and plaintiff excepted. The court then told the witness to state only what respondent said to plaintiff, whereupon the witness said: "I heard the defendant (Mr. Fitzell) tell Mr. Kelley (plaintiff) that he would not take any interest in the ditch; that he had not got the money to pay out on it; but that he would work on the ditch for Mr. Kelley, (plaintiff,) and take his pay in water; that was about the middle of October, 1880." While we do not doubt that the court erred in sustaining the above-mentioned objection, we cannot see how the plaintiff could be prejudiced by it. His witness testified to a declaration or avowal of defendant that he would not take any interest in the ditch, and that was all plaintiff was trying to prove. Nothing which the plaintiff could have said at the time would add any force or weight to this evidence. The declaration or avowal of defendant, as testified to, was clear and explicit. It could not be made more so by anything which the plaintiff could have said.

Judgment and order affirmed.

We concur: MYRICK, J.; THORNTON, J.

2 Cal. Unrep. 271

PEOPLE v. JORDAN.

Filed February 26, 1884.

Appeal dismissed; previous appeal from same judgment being perfected.

Department 1.

By THE COURT. This is an appeal by the people from a judgment or order in favor of defendant on a demurrer to the indictment. Penal Code, 1238. The notice of appeal was served and filed on the tenth day of November, 1883. If the judgment or order was appealable the people had perfected an appeal from the same on the twenty-sixth day of October, 1883.

The appeal must therefore be dismissed.

65 Cal. 93

STOCKTON BUILDING & LOAN ASS'N v. CHALMERS and others.

Filed February 26, 1884.

The intestate having merely occupied, without pre-empting, the land in question, homestead proceedings could only operate upon such right as he had at his death; such proceedings could not affect a mortgage afterwards given by one who pre-empted the land, and where neither he nor the mortgagee knew of the rights claimed under the homestead proceedings.

In bank.

Irwin & Carpenter, for appellants.

Geo. G. Blanchard and *W. L. Dudley*, for respondent.

MYRICK, J. This is an action to foreclose a mortgage executed by one Robert Chalmers in his life-time. His executor and executrix and a junior mortgagee were made defendants. Joseph and Martin Alhoff are intervenors, and, the court having rendered judgment against them, and directed a sale of the mortgaged premises, they have appealed. The intervention is based upon the following facts:

In 1855 one M. Alhoff went into the occupation of a small tract of unsurveyed government land, and thence resided thereon, with his family, until his death. He extended his possessions so as to embrace some 22 or 23 acres, planted a vineyard, built a house, wine cellar, and distillery. He was qualified to pre-empt, but took no steps in that direction other than to occupy the land. He died in 1867, leaving him surviving a widow (Louisa M.) and two sons (the intervenors.) In that year (1867) the place was set apart, by the probate court, to the widow and two sons as a homestead, and they continued to reside on the premises until July, 1869, when the said Louisa M. intermarried with Robert Chalmers, and she removed, with her sons, to the

house of said Chalmers, on the other side of the road dividing the Chalmers place from the Alhoff place. In May, 1869, said Chalmers had been appointed guardian of the persons and estates of the two boys, and received letters; but he filed no inventory or report. The United States survey of the land was completed July 31, 1871. In 1871 or 1872, Robert Chalmers filed a pre-emption claim, which embraced his residence on the east side of the road, as well as the east 9 13-100 acres of the Alhoff place, and in August, 1873, he received a United States patent for the same. On the twenty-seventh of September, 1874, said Chalmers deeded to Louisa M. and the two boys the westerly 13 19-100 acres of the Alhoff place, retaining the title to the easterly 9 13-100 acres on which were located the dwelling, barn, and a portion of the wine cellar. On the same day he executed the mortgage in suit, which embraced the easterly 9 13-100 acres and his own residence, with other property, but did not embrace the westerly 13 19-100 acres. In January, 1879, said Chalmers moved to the Alhoff house, and resided there until his death, in 1881.

In March, 1879, said Robert Chalmers executed the second mortgage to his son, the defendant Hugh Chalmers. The intervenors attained majority, respectively, Joseph on the seventeenth of September, 1878, and Martin on the twenty-first of November, 1879.

The intervenors claim that by virtue of the homestead proceedings in the Alhoff estate they became tenants in common with their mother in the ownership of the premises; that when Chalmers acquired the title from the United States government he acquired it for them, and thence held in trust for them; and that the possession by their father and the setting apart by the probate court imparted to the plaintiff sufficient notice to put it upon inquiry, and that it is not an incumbrancer in good faith without notice. We do not think the homestead proceedings in any manner affect the mortgage. Those proceedings operated only upon whatever right the intestate had at the time of his death. The court found that neither the plaintiff nor those through or from whom it acquired the note and mortgage had any knowledge of the alleged right or title of the intervenors prior to the commencement of this action. There is evidence sufficient to sustain this finding.

The judgment and order are affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.; MCKINSTRY, J.; ROSS, J.; MORRISON, C. J.

The finding that the defendants neither have nor had any title to the land is sustained by the evidence, and, this being so, it is immaterial to them who the owners were who dedicated it for a street, and they cannot object that there is no finding by the court, as to who such owners were.

In bank.

C. A. & C. Tuttle and Jarboe & Harrison, for appellants.

George E. Whitney, for respondent.

MYRICK, J. The court below found that the land in controversy constitutes a portion of a public street, which had been wrongfully and unlawfully obstructed by the defendants, and that the defendants had and have no right or title thereto. In arriving at the conclusion that the land was a portion of a street, the court found that the same had been dedicated as a public street by the owners, and had been, with the permission of the owners, used by the public as a public street and highway from the beginning of the year 1853 to the end of the year 1859. The defendants object to the sufficiency of the findings, in that the court did not find who were the owners who thus made the dedication. If the defendants or their grantors have and had no interest in the premises, and no title thereto, it is an immaterial fact to them who were the owners.

The finding that the defendants had and have no right or title to the land is sustained by evidence, viz., the evidence of surveyors, tending to show that the quantity of land specified in the subdivisions of tract D, as per map of the subdivisions, is contained in the tract, placing the southern line of the tract 80 feet north of the northern tier of blocks, as delineated on the Kellersberger map; there is evidence tending to show that from the fence built along the southern line of subdivision No. 9 to the northern line of the so-called Fourteenth street, the distance is found as delineated on the map of tract D; there is evidence tending to show that the persons who caused the Kellersberger map and survey to be made caused a street of the width of 80 feet to be laid out, surveyed, and staked over and upon the premises in controversy; there is evidence tending to show that the northern tier of blocks, as delineated on the Kellersberger map, does not reach within 80 feet of the southern line of tract D, and, if that be true, the partition deed between the original owners did not include the premises, and they were not included in the deed from J. K. Irving to Goggin of subdivision No. 1 of tract D, and therefore not included in any deed conveying or purporting to convey the title of the original owners. The Kellersberger map delineates blocks and streets from the water front to the north line of the northern tier of blocks, giving the distance as 3,815 feet; the partition map gives the westerly line of the space marked thereon "Oakland" as 63 chains—i. e., 4,158 feet; this westerly line is considerably less than the distance, as shown on the map, from the water front to the northerly line of the space marked "Oakland," thus showing (at least sufficiently certain to sustain the finding) that the Kellersberger map did not embrace all the land between the water front and the tract D, as partitioned to J. K. Irving.

In this view of the case the other matters assigned as error become immaterial.

This case was here on a former appeal, at which time a new trial was granted. 60 Cal. 497. In the consideration of that appeal, it was assumed that the north line of the blocks as delineated on the Kellersberger map corresponded with the south line of tract D; the discrepancy now apparent was not considered. This is mentioned to explain what would otherwise appear to be an inconsistency between the facts appearing on that appeal and on this. In the partition map "Oakland" is delineated as lying immediately south of tract D; and probably this fact led to the supposition that "Oakland" of the partition map corresponded with the Kellersberger map.

The judgment and order are affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

MORRISON, C. J. I concur in the judgment.

2 Cal. Unrep. 277

CHALMERS v. CHALMERS.

Filed February 28, 1884.

The evidence supports the finding that the mortgage herein is not affected by the heretofore unknown rights of the intervenors.

In bank.

W. L. Dudley, Charles F. Irwin, and Geo. J. Carpenter, for appellants.

Geo. G. Blanchard, for respondent.

BY THE COURT. This action is similar to that of *Stockton Building & L. Ass'n v. Chalmers*, ante, 101, except that this is to foreclose the junior mortgage. The court found that the plaintiff had no knowledge of the alleged rights of the intervenors until the complaint in intervention was filed; and there is evidence sufficient to justify the finding.

Judgment and order affirmed.

EMERIC v. ALVARADO and others.¹

Filed February 27, 1884.

The costs in this appeal to be as costs in the cause, and so adjusted on final judgment.

In bank.

BY THE COURT. In this cause the court overlooked the question of costs on the appeals. As to this point, it is ordered that the costs of the appeals taken in this cause be treated as costs in the cause, and be adjusted as such on the final hearing and judgment herein.

(2 Cal. Unrep. 252)

OHLEYER v. BUNCE.

Filed January 28, 1884.

In a case of *involuntary* insolvency there is no provisions for serving any notice on the creditors who are the moving parties in the proceeding, and jurisdiction to appoint the assignee is acquired by the service upon the debtor of the creditors' petition and order of the court.

Department 2.

J. H. Craddock and J. S. Belcher, for appellant.

Stabler & Bayne, for respondents.

SHARPSTEIN, J. The court found, among other things, that at the date of said transfer said Marcuse was insolvent, and in contemplation of insolvency, and to prevent his property from being distributed ratably among his creditors he made said sale and transfer of said goods, wares, and merchandise; that said sale and transfer were not made in the usual and ordinary course of business of said Marcuse, and for that reason—there being no evidence sufficient to overcome the legal presumption raised by that fact—the defendant had reasonable cause to believe that said Marcuse was insolvent; and that said sale and transfer were made with a view to prevent the said property from being ratably distributed among the creditors of said Marcuse. The court did not find everything alleged in regard to said transfer, but it found enough to avoid the sale, and it was unnecessary to find more. The finding that the court in which the insolvency proceeding was

¹See S. C. 2 PAC. REP. 418.

pending, "by an order duly made and given," appointed the plaintiff herein assignee of the estate of said insolvent, is attacked on the ground that there was not such proof as the law requires of the publication of the order appointing a meeting of creditors. In cases of *voluntary* insolvency it is provided that on receiving and filing the petition, schedule, and inventory the court shall make an order declaring the petitioner insolvent, and appoint a time and place for a meeting of the creditors to prove their debts, and choose one or more assignees, and shall designate a newspaper or newspapers in which publication of said order shall be made, and that a copy of said order shall immediately be published by the clerk in the newspaper or newspapers designated as often as the newspaper is printed before the meeting of creditors. But in cases of *involuntary* insolvency, the court, on the filing of the creditors' petition, is required to issue an order requiring the debtor to show cause, at a time and place to be fixed by the court, why he should not be adjudged an insolvent debtor; and a copy of the petition and order to show cause must be served on the debtor. No provision is made for the service of any notice on the creditors, who are the plaintiffs in such cases. But the court is required to appoint a day for their meeting to elect an assignee. In a case of *voluntary* insolvency, the proceeding as to creditors is one *in invitum*; but in case of *involuntary* insolvency, the reverse is true. The proceeding is, then, one *in invitum* as to the debtor, and the Code provides how and in what manner he shall be served with notice, but makes no provision for the service of any notice on the creditors who are the moving parties, or the plaintiffs, in the proceeding. In a case of *voluntary* insolvency the court does not acquire jurisdiction to appoint an assignee until after the order mentioned in section 6 has been made, and a copy of it published, as provided in section 7. In a case of *involuntary* insolvency jurisdiction is acquired by receiving the petition mentioned in section 8, making the order specified in section 9, and serving both the petition and order in the manner provided in section 10.

In this case the defendant objects that the creditors were not duly notified of a proceeding instituted by themselves, and therefore that the court did not acquire jurisdiction to appoint an assignee of his estate. We think jurisdiction was acquired in this case by the service of a copy of the petition of the creditors, and order of the court on the debtor, and that the law did not require the publication of notice to creditors as appellant contends. It does not appear that the debts of the petitioning creditors were created after the act of 1880 took effect, nor does it appear that they were not. We are informed by the transcript that "the creditors' petition in involuntary insolvency" was introduced in evidence by the plaintiff; contents not stated. It may have shown that the debts were created after the act of 1880 went into effect. If it did not, the appellant should have incorpo-

rated it in the record, in order to overcome the finding that the order appointing plaintiff assignee *was duly made and given*.

Judgment and order affirmed.

We concur: THORNTON, J.; MYRICK, J.

2 Cal. Unrep. 248

Ex parte BAILEY.

Filed January 24, 1884.

Where, from the return to a writ of *habeas corpus* on behalf of a prisoner held under requisition proceedings, it appears that the proceedings are regular, and that the act of congress concerning fugitives from justice has been substantially complied with, the prisoner will be remanded.

In bank.

Application for a writ of *habeas corpus*.

The petitioner, Charles H. Bailey, was arrested, as a fugitive from justice, on a warrant issued by the governor of California upon demand of the governor of Oregon. Application was made for a writ of *habeas corpus*, petitioner claiming to be unlawfully restrained of his liberty, in that the warrant under which he was arrested was issued without authority of law as no copy of an indictment found, or affidavit charging said petitioner with any crime, had been produced to the governor of California. The return showed the warrant issued as above, as authority for the arrest and as evidence of its regularity.

Frank O'Connor, for petitioner.

Alfred Clarke, for respondent.

By THE COURT. Without passing on the question whether this court has the power to go behind the return herein, we say that it clearly appears to us, from the papers produced, on which the governor of this state acted, that his action was regular, and that it substantially complied with the act of congress concerning fugitives from justice. The petitioner is therefore remanded.

Cal.Rep. 1-4 P.—19

64 Cal. 461

WILCOX v. HAUSCH and others.

Filed January 22, 1884.

The diversion of water from a natural stream, on the part of one who has conducted some water to it, will be restrained at the suit of a riparian proprietor, unless the former show that he has not diverted from it more water than he led to it.

Department 1.

Appeal from the superior court of Tulare county.

This was an action brought to restrain the defendants from maintaining a dam in a creek passing through plaintiff's land, so as to cause a diversion of all the water of such creek. Defendants denied that this creek was a natural stream, or that any water flowed in it except such as was conducted to it by them. The court found that such creek was a natural stream, having a defined course and regular flow of water; that said defendants did lead more water to the stream than ordinarily flowed in it, but that the dam obstructed not only that amount of water but the whole natural flow of the stream. The court, therefore, granted the plaintiff a perpetual injunction prohibiting the diversion of any water.

Brown & Daggett, for appellant.

Atwell & Bradley, for respondents.

BY THE COURT. There was evidence to sustain the findings of the court. If it be conceded that, as against a riparian owner below, a person, not such, may turn into a natural stream water which would not naturally flow therein, and again divert the quantity of water which he led to the stream, the fact that he has conducted *some* water to it will not authorize him to divert all the water of the stream; and it is for him who has thus interfered with the natural flow to show that he has not taken from the stream more water than he led to it. Otherwise the plaintiff, riparian proprietor, is entitled to an injunction, prohibiting the diversion of any water.

Judgment and order affirmed.

3 Cal. Unrep. 248

PEOPLE v. LEE HUNG.

Filed January 23, 1884.

Where no points and authorities are filed within the time allowed, judgment will be affirmed.

Department 1.

Appeal from the superior court of Sacramento county.

An appeal was taken from an order sustaining a demurrer to an indictment for arson. No points and authorities were filed in the case.

C. T. Jones and *J. W. Carter*, for appellant.

Atty. Gen. Marshall, for respondent.

BY THE COURT. No points and authorities have been filed in this case, although the time extended for that purpose has long since elapsed. It is therefore ordered that the judgment be affirmed.

2 Cal. Unrep. 251

WILSON v. BAKER and others.

Filed January 26, 1884.

Where the evidence is insufficient to support the findings the judgment will be reversed.

Department 2.

Appeal from the superior court of Stanislaus county.

This was an action brought by plaintiff, a creditor of one Love, to compel defendants, also creditors of said Love, to sign a memorandum of an agreement entered into between said Love and all his creditors, whereby he was to make an assignment for their benefit; and also to restrain defendants from further pursuing proceedings for the recovery of their indebtedness by attachment against said debtor's property. The court found that the defendants, through an authorized agent, had entered into such agreement, and had consented to dismiss their attachment and suit on condition that plaintiff also dismiss his suit against said debtor; that plaintiff performed the conditions on his part, but that defendants fraudulently refused to dismiss their attachment or join in an assignment until their claim had become a lien preferred under the statute. Defendants appealed from an order refusing to grant a new trial.

Roche & Desbeck, for appellants.

W. E. Turner and Schell & Treat, for respondent.

MYRICK, J. The evidence is insufficient to support the findings of the court below in the following particulars: In finding 8, that Caldwell was authorized to act for and on behalf of the defendants at the meeting of creditors, and by his acts to bind the defendants, and to enter into any agreement or contract with Love or his creditors; finding 10, so far as it is found that the defendants, or any person thereto authorized by them, made or joined in or ratified the agreement set forth in said finding 10; the whole of finding 13; finding 14, so far as it states or infers that the defendants entered into any agreement; finding 17, so far as it is found that the defendants, at the said meeting of creditors, agreed to sign any agreement; finding 20, as to any fraud on the part of defendants.

The judgment and order are therefore reversed, and the cause is remanded for a new trial.

We concur: THORNTON, J.; SHARPSTEIN, J.

SUPREME COURT OF CALIFORNIA.

65 Cal. 90

BLACK v. MERRILL.

Filed February 28, 1884.

Where a party sues to reopen a settlement and sale between partners, and to have an accounting, the court cannot grant the plaintiff judgment for moneys collected and appropriated by the defendant, and have no setting aside of the sale, and no accounting as prayed for.

The relief awarded a plaintiff must be consistent with his complaint; he cannot allege one cause of action and recover in another.

Department 1.

Geo. E. Whitney, for appellant.

M. G. Cobb and *G. W. Langan*, for respondents.

Ross, J. It is thoroughly and well settled that the relief awarded a plaintiff must be consistent with the case made by his complaint. The complaint in the present instance is a bill in equity to reopen a settlement and sale between partners, and to obtain an accounting of the partnership affairs, on the ground of fraud alleged to have been practiced by the defendant. On the trial in the court below no accounting of the affairs of the partnership between plaintiffs and defendant was taken, but certain evidence was introduced, from which the court found these facts:

That in April, 1877, plaintiffs and defendant entered into a copartnership for the purpose of manufacturing and vending brick in Alameda county, of this state; that defendant became the managing partner of the firm in Oakland, where the principal place of vending the brick was carried on,—plaintiffs having more immediate charge of manufacturing the brick; that books of account were kept at Oakland by the son of defendant, purporting to contain all of the business transactions of the firm in Oakland, to which books plaintiff Black had access at all times, and which books were examined from time to time from December, 1877, to the time next hereinafter mentioned, by an expert appointed by Black and paid by the firm; that on the thirtieth day of October, 1878, there stood upon said books, among other things, accounts against certain persons aggregating \$831.52; that on said thirtieth day of October defendant sold his interest in the firm, and its assets, to the plaintiff Black for the sum of \$9,127.01,—plaintiff Merrill consenting thereto, and agreeing with Black, as a part of the consideration of the sale, and of the retirement of the defendant from the firm, to assume and pay the debts due from the firm as the same appeared upon the books; that Black paid defendant the sum of \$9,127.01, defendant retired from the firm, and plaintiffs afterwards paid its debts; that the aforesaid purchase of defendant's interest was made "upon the faith and belief that said books of account exhibited the true state and condition of the business transacted by him on behalf of the firm, and especially a true statement of the balance due from

the various debtors of said firm, and a true statement of the various persons indebted to said firm;" that the accounts referred to as aggregating \$831.52 had, previously to the aforesaid sale, been paid by the persons against whom they stood, and the money received by the defendant, and by him appropriated to his own use, and for this sum the court below gave the plaintiffs judgment, with costs.

The difficulty in the way of affirming the judgment is that it is not warranted by the complaint. That, as was stated at the outset, is a bill in equity to reopen a settlement and sale made between partners, and to obtain an accounting of the partnership affairs, on the ground of fraud alleged to have been practiced by the defendant. The court did not set aside the sale and take an accounting, but in rendering its judgment evidently proceeded upon the theory either of a warranty on the part of the defendant of the accounts referred to as aggregating \$831.52, or else considered that the action might be treated as one for deceit. But it was not for a breach of warranty, or for damages for deceit, that plaintiff sued. A party cannot allege one cause of action and recover upon another.

Judgment and order reversed, and cause remanded for a new trial.

We concur: McKEE, J.; McKINSTRY, J.

2 Cal Unrep. 274

GILMAN v. CURTIS.¹

Filed February 28, 1884.

Where a plaintiff, while owner of a policy of life insurance, has assigned the same to the defendant, to secure advances made such defendant, and afterwards sues for a reassignment of the policy in order to collect it from the insurance company, the court should not adjudge the plaintiff the owner of the policy and entitled to receive the whole amount from the company, for the interest of the plaintiff is only what remains after the advances have been satisfied. The defendant has the legal title, and cannot be made to surrender it until his advances have been paid.

Department 1.

H. G. Siebert and G. F. Sharp, for respondent.

Ross, J. To this suit Gilbert Curtis and the Aetna Life Insurance Company were originally made defendants. The controversy grows out of a policy of insurance issued by the company upon the life of one A. W. Tucker. The complaint charges that the policy was issued upon the life of Tucker and delivered to one Esther Cordelia Curtis, who, it is alleged, paid the premiums thereon. It is not alleged to whom the policy was made payable. There are, however, allegations and findings to the effect that Esther Cordelia Curtis assigned the

¹ Reversed in banc. See 4 Pac. 1094, 66 Cal. 116.

policy to the plaintiff, who subsequently caused the same to be assigned to the defendant Gilbert Curtis as security for certain advances to be made by him for and on account of the said Esther Cordelia Curtis. The findings are that the advances so made, for the security of which Gilbert Curtis received the policy, amounted to \$4,071.21. There is nothing in the case to show that the plaintiff became personally responsible for those advances. The prayer of the complaint is for a decree to the effect that the plaintiff is the owner of the policy, and entitled to collect and receive from the insurance company the money for which it was issued, the insured having deceased; that the interest of the defendant Gilbert Curtis therein be determined; that he be required to assign and deliver to the plaintiff the policy, and, he failing to do so, that the clerk of the court execute such assignment, and that both defendants be restrained from disposing of the policy or the moneys mentioned therein to others than the plaintiff. There was also a prayer for general relief. The record discloses no service or process on or appearance by the *Ætna Life Insurance Company*, but the judgment entered in the cause recites that the action was "dismissed as against the *Ætna Life Insurance Company* and the intervenor herein." The sole parties to the suit are therefore the plaintiff and the defendant Gilbert Curtis.

The following is the decree entered in the court below:

"Now, therefore, by reason of said verdict and finding, it is ordered that judgment be entered herein in favor of the plaintiff, and against the said Gilbert Curtis, as of the date of said verdict, to-wit, on the ninth day of May, 1881.

"It is therefore ordered, adjudged, and decreed that the plaintiff is the owner of the policy of insurance, No. 81,308, issued by the *Ætna Life Insurance Company* upon the life of A. W. Tucker, deceased, which said policy of insurance was issued upon the life of said A. W. Tucker for the sum of \$10,000, and which was duly assigned, transferred and set over to the plaintiff, as alleged in plaintiff's complaint.

"That while the plaintiff was the owner of said policy of insurance she assigned and caused the same to be transferred to the defendant Gilbert L. Curtis, in trust, to secure future advances to be made by the defendant Gilbert L. Curtis to pay Judge SWIFT and the Sacramento Bank certain liens and claims that they had, or claimed to have, upon said policy of insurance.

"And the jury having found, by their verdict, that the defendant Gilbert L. Curtis had, at the date of their said verdict, advanced the sum of \$4,071.21, which amount they found to be due him for money so advanced as aforesaid, the said defendant Gilbert L. Curtis is therefore entitled to receive said amount so found to be due, less the cost of suit; and that the said policy of insurance is subject to said trust and payment of said sum of \$4,071.21, which amount is to be paid to the defendant Gilbert L. Curtis when said policy shall be paid by the *Ætna Life Insurance Company*.

"And the plaintiff, upon the payment of the said sum, is entitled to have and receive from the said Gilbert L. Curtis a surrender and reconveyance of said policy, and that the said plaintiff is entitled to receive from the *Ætna Life Insurance Company* the whole amount due upon said policy. And the plaintiff is entitled to have and recover from the said Gilbert L. Curtis her costs in this action, levied at the sum of \$519.32."

The decree as entered is, we think, obnoxious to some of the objections urged by counsel for appellant. As the jury found—and the court approved and adopted the finding—that the plaintiff assigned the policy to defendant to be held by him as collateral security for certain advances to be, and which were, made by him, the legal title to the policy passed by the assignment to the defendant. The court should not, therefore, have adjudged the plaintiff the owner of the policy, and entitled to receive from the insurance company the whole amount due upon it. The interest of the plaintiff in the policy is in what remains of it after the advances, for the security of which it was assigned, have been satisfied. To that excess plaintiff is equitably entitled. But since the defendant was, by the assignment, invested, not only with a lien upon the policy, but with the legal title thereto, as security for his advances, it is clear that he cannot be made to surrender it to the plaintiff until the advances made by him are repaid; and since there is no personal obligation on the plaintiff to repay the advances, and the policy does not appear to have been paid, we do not see what other decree can properly be entered on the findings than one declaring the interests of the respective parties in and to the policy and moneys growing out of it, and directing the defendant to seek the enforcement of its payment, and, in the event of its payment, that the defendant, after deducting the amount of the advances for the security of which the policy was assigned, pay the remainder to the plaintiff. The plaintiff is also entitled to costs of this suit.

Cause remanded, with directions to the court below to modify the judgment so as to accord with the views above expressed.

We concur: McKINSTRY, J.; McKEE, J.

2 Cal. Unrep. 277

SWEETSER and others, Ex'rs, etc., v. DOBBINS.

Filed February 28, 1884.

The findings of a court on special issues are merely advisory to the court, and, if adopted, are the findings of the court. If a general verdict be rendered by the jury, the court can set it aside and find the facts, and render judgment on the testimony taken, and in case of a general verdict must, notwithstanding the verdict, find the facts.

In cases at law the verdict of a jury is final, unless set aside; but in equity it is merely advisory, and may be adopted or not, as the court sees proper.

Where in an equity case, if tried alone by the court, the evidence would be required to be clear and convincing, the same rule must apply to the jury as to evidence submitted to them in the same case. A mere preponderance of testimony will not be sufficient.

There is no error in regard to the admission of the evidence herein, and it does not appear that the judge assumed that he was conclusively bound by the verdict of the jury, though he arrived at the same conclusion.

Department 2.

Geo. A. Lamont, for appellants. Geo. A. Nourse, of counsel.

J. McKenna, Wendell & Kelley, and A. J. Dobbins, for respondent.

MYRICK, J. The complaint in this case was filed to obtain a decree reforming a deed executed by defendant to plaintiffs' testator, so as to include a tract of land not included therein, and that said tract be conveyed to them in their representative capacity. The plaintiffs alleged that by the agreement of their testator and the defendant the tract was agreed to be embraced in the deed, and was omitted therefrom by the mistake and inadvertence of the scrivener. The defendant denied such agreement and mistake, and alleged that the deed contained all the land which he had agreed to convey. Special issues were submitted to a jury, and the verdict was, in effect, in favor of defendant. The court filed findings as to all the facts in issue, in which, after reciting the fact that a jury had been impaneled to try special issues, and had rendered a verdict, it is stated: "Now, from said verdict and the testimony adduced in said cause, after due consideration, the court finds the following facts," etc. On this appeal points are presented by the plaintiffs, viz.:

1. The court instructed the jury that as to the first issue presented to them (which was merely as to whether the land of defendant was divided into seven or eight parcels) the rule was that a preponderance of evidence should govern them; but as to the other evidence (which related to the alleged agreement and mistake) a different rule obtains from that in ordinary civil actions; that to establish a mistake in the execution of a written instrument the evidence as to the mistake must be clear and convincing; that the evidence must be more than mere preponderance,—it must be clear and convincing.

The plaintiffs allege this instruction to be error; that subdivision 5, § 2061, Code Civil Proc., furnishes the rule in *all* civil cases; that "when the evidence is contradictory the decision must be made according to the preponderance of evidence;" that the instruction gave one rule to one class of civil cases, viz., an action to reform an instrument, and another rule to other civil cases. It was decided by this court in *Bates v. Gage*, 49 Cal. 126, that the findings of a jury on special issues are merely advisory to the court, and, if adopted by it, are the findings of the court. In *Wingate v. Ferris*, 50 Cal. 105, it was held that if a general verdict be rendered by the jury, the court can set aside the verdict, (without motion for a new trial,) and find the facts, and render judgment on the testimony already taken; and in *Brandt v. Wheaton*, 52 Cal. 430, it was held that in case of general verdict the court must, notwithstanding the verdict, find the facts.

If it be a correct principle that a general verdict may be disre-

garded by the court, and a decision be rendered by it on the testimony already given, and if a verdict on special issues is merely advisory, to be adopted by the court or not, as it is convinced, how far was it error for the court to instruct the jury as it did, conceding, for the purpose of this case, that the statute above quoted furnishes the rule for *all* civil cases? The court found all the facts. It found that the agreement alleged in the complaint was not made; it found that the agreement alleged in the answer was made; it found that no parcel of land was omitted, through mistake or inadvertence, to be mentioned or described in the deed; it found that the deed included all the land intended to be conveyed, and correctly expressed the intention of the parties to the same. As above stated, the court said, as preliminary to the facts: "Now, from said verdict, and the testimony adduced in said cause, after due consideration, the court finds," etc. What answer of the jury did the court rely upon and adopt as the basis of its findings, and what finding was based on the determination of the court from the testimony? This does not appear. It does not appear that the court adopted any portion of the verdict, as distinguished from exercising its own judgment. It is true, the court said, "from said verdict;" but it also said, from "the testimony adduced in said cause, after due consideration, the court finds."

The court had authority to rely on its own opinion in regard to the weight of evidence, and in doing so it is to be presumed that it was governed by proper and legal rules. According to the section of the Code above referred to, the jury is to be instructed by the court, "on all proper occasions," that, when the evidence is contradictory, the decision must be made according to the preponderance of evidence. This evidently refers to all cases where the decision of the jury is final as to facts. In cases at law the decision of the jury is final, unless set aside; but in equity cases it is merely advisory, and may be adopted or not, as the court shall be convinced. If this case had been tried by the court without a jury, there is no doubt that the court would have been governed by the rule that the law presumes the deed to speak the intention of the parties, and, to overcome such presumption, the plaintiffs would have been required to show, by proof clear and convincing, that it did not so speak. It must therefore necessarily follow, in cases where a verdict is but advisory, that the same rule should govern a jury. It cannot be that the legislature intended one rule regarding the weight of evidence to apply to a court and another rule to a jury, in arriving at a decision in the same case. The court was not bound to enforce upon the jury a rule which it was not bound in law or in conscience to apply to its own action.

2. It was not error for the court to caution the witness Lamont not to give evidence of facts based on knowledge derived from Pierce, (plaintiff's testator,) or by hearsay from others; nor to strike out the evidence based thereon already given.

3. The witness Lamont was asked whether or not he would have

attached certain property if he had not supposed it was mortgaged, and an objection to the question was sustained. Conceding it to be possible for a person to tell what he would or would not have done regarding a transaction now passed, we do not see that it could have affected the verdict. The matter for consideration was, what did he do—not what he would have done.

4. We see no error in permitting the cross-examination of the witness Lamont to include the original complaint.

5. A witness, Rush, was examined as to a conversation had by him with the defendant. He had not a distinct recollection of what the defendant said, and on cross-examination was asked as to the impression left on his mind from what was said. If the court erred in overruling the objection, the error did appellants no harm, because the answer was favorable to them.

6. The mortgage first executed by the defendant was a portion of the transactions between the parties culminating in the deed in question, and it was admissible in evidence.

7. It was not error to admit Coghlan's testimony as to the *data* had for drafting the mortgage, made February 1, 1876; nor—

8. To allow Coghlan to testify he had no doubt that he had compared the instrument with the *data* from which it is drawn.

9. The witness Lamont, called for plaintiffs, had testified as to conversations had by him (on behalf of Pierce) with the defendant, and negotiations between them, and had given his version of those conversations and negotiations. He testified that defendant's only proposition was, "I will give you a deed to the ranch, and you give up all my papers." The defendant, on his own behalf, testified as to an additional offer made by him during those conversations and negotiations. Lamont was called, in rebuttal, to deny such offer, and an objection thereto was sustained. The witness having already testified as to the conversations, and having stated what was defendant's only proposition, thus saying there was no other, it was doubtless in the discretion of the court to permit or refuse a further examination relating thereto.

10. As to the tenth point, we cannot see that the jury was misled or confused by the nature of the instructions.

11. The appellants complain that the judge of the court below assumed that he was conclusively bound by the verdict of the jury. It does not appear that the judge came to a different conclusion from the testimony than that arrived at by the jury. The judge says: "In this case there is a contradiction of witnesses—as decided a conflict as I have ever seen;" but he does not say that he would have decided other than as the jury did; therefore, no error is manifest. In ruling on plaintiffs' motion to set aside the verdict, and for judgment, the court said: "I do not see any circumstance in this case by which I feel that I am warranted in setting aside the verdict;" thus, in effect, expressing his view of the evidence.

12. The court found that defendant was not in embarrassed circumstances, pecuniarily. Objection is made that this finding is not sustained by the evidence. Granting that it is not sustained, yet, as a fact to be found, it was an immaterial matter. Proof of his pecuniary circumstances may have had some bearing on the case as evidence, but it was not an ultimate fact. The ultimate facts were whether or not the parties had agreed that the omitted tract should be included in the deed, and whether the omission was by mistake. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

65 Cal. 3

DE CELIS v. PORTER.

Filed February 28, 1884.

This court can only draw inference of law from the findings, and not inference of fact from the facts found. That is the province of the trial court alone.

From the findings of the court below the judgment is modified as to the rate of interest to be paid.

Department 2.

Glassell, Smith & Patton, for appellant.

Graves & Chapman, F. H. Howard, and *R. M. Widney*, for respondents.

BY THE COURT. The petition for a modification of the judgment calls attention to the fact that the interest should be charged on the credit allowed on the mortgage, \$5,255.30, with interest from the fourteenth of June, 1876, instead of from the seventh day of June, 1879. If it had been found as a fact by the court below that the credit on the mortgage was allowed as of the fourteenth of June, 1876, we should unhesitatingly order the modification. But it is not so found. Of what date such credit was allowed is a fact which this court cannot find, but which should have been found by the court below. It may be that the credit was allowed as of the fourteenth of June, 1876, but this can only be arrived at in this court by an inference of one fact from others found, which we cannot make. The only inferences which can draw from the findings are inferences of law. We are not allowed to draw inferences of fact from the facts found. If this court were to infer a fact from other facts, it would be usurping the province of the trial court, which alone can find the facts in issue. This is the rule with regard to special verdicts, and we are of opinion that

the same rule applies to findings of fact. There is no finding that the credit referred to was allowed of an earlier date than that mentioned in the opinion in the cause, and in directing a judgment on the findings we must adhere to the facts as found. But the contract of the fourteenth of June, 1876, of which the mortgage sued on forms a part, which it is held was revived by the promise of Porter at the conference in relation to the judgment which was entered in this court in 1879, does bind Porter to pay interest on three-fourths of this credit at the rate of 10 per cent. per annum, and the judgment should be modified so as to allow interest at the rate last named, as against Porter, from the seventh day of June, 1879. But Maclay has made no promise to pay interest at that rate. Maclay is only bound to pay the legal rate. And if Maclay should be called on to pay anything on the deficiency judgment, the interest as against him should be computed only at the rate of 7 per cent. This applies not only to the computation to determine the amount of the deficiency as against Maclay, but interest on the deficiency so determined, as against him, should be computed at the same rate.

The judgment is modified in this regard, and the court below, in entering judgment, will regard these directions, in addition to those given in the opinion filed on the twenty-ninth day of January, 1884.

65 Cal. 92

McCOY v. BYRD.

Filed February 28, 1884.

An applicant, seeking to purchase lands from the state, must state in his affidavit all the facts required by statute. The courts cannot hold immaterial matters which the statute declares must be stated.

Department 1.

F. McNamara and A. J. Atwell, for appellants.

Edwards & Du Brutz, for respondent.

Ross, J. It is well settled that an applicant seeking to purchase land from the state must set out in his affidavit the facts required by the statute to be stated therein. *Botsford v. Howell*, 52 Cal. 158; *Hildebrand v. Stewart*, 41 Cal. 387; *Woods v. Sawtelle*, 46 Cal. 389. The statute under which the plaintiff's application is made (Pol. Code, § 3443) requires the affiant to state, among other things, that he knows the land applied for, and the exterior bounds thereof, and knows of his own knowledge that there are no settlers thereon; or, if there are, that the land has been segregated more than six months

by authority of the United States. From the affidavit of the plaintiff it does not appear whether there are or are not settlers on the land which he seeks to purchase. The courts cannot hold immaterial matters which the statute declares must be stated.

Judgment affirmed.

We concur: MCKINSTRY, J.; MCKEE, J.

2 Cal. Unrep. 282

MARTIN v. JACOBS.

Filed February 28, 1884.

The owner of cattle and horses is responsible for the willful entry therewith upon lands belonging to another and in his possession.

The rule as to notice to the owner, where a lien is asserted upon such cattle, etc., does not apply to this case.

Department 1.

C. P. Sprague, for appellant.

W. B. Treadwell, for respondent.

Ross, J. The statute under which this action was brought—act of March 20, 1878, (St. 1877-78, p. 360)—makes the defendant liable for the acts charged in the complaint, and proved and found against him in the court below; that is to say, the willful entry by the defendant, with cattle and horses, upon land belonging to and in the possession of the plaintiff, and depasturing the same to plaintiff's damage. The first section of the act reads:

"If any horse, mare, mule, jack, jenny, hog, sheep, goat, or herd of neat cattle, or any number of such animals, shall break into or enter upon any private lands, whether inclosed or not, the owner of or person keeping, harboring, or controlling such animals shall be liable to the owner or possessor of such lands for the amount of all damages caused by such trespass; or, when the trespass is continuing in its nature, for all damage caused by such continuing trespass; such damages to be recovered in a civil action brought for that purpose."

In addition to the remedy given by the section just quoted, subsequent sections of the act provide for a lien upon the trespassing animals under certain circumstances, and when such lien is asserted, for notice to the owner of the stock. But those provisions do not apply to the present case. The evidence is sufficient to sustain the findings.

Judgment and order affirmed.

We concur: MCKINSTRY, J.; MCKEE, J.

MONTGOMERY v. MERRILL.

Filed February 28, 1884.

No error appears in the rulings, and the order is affirmed.

Department 1.

H. M. Alberry, for plaintiff.

John T. Harrington, for defendants.

BY THE COURT. This is an appeal by the receiver from the order of the court below settling his accounts. We have examined the rulings as to the items of the account to which our attention is called, and find no error in them. It would serve no useful purpose to go over the items in detail.

Order affirmed.

HAYSMEISTER v. PORTER.

Filed February 28, 1884.

Judgment reversed; following *Meyer v. Porter*, 2 PAC. REP. 884.

Department 1.

Rosenbaum, Sheeline & S. C. Denson, for appellant.

W. A. Anderson and McKime & George, for respondent.

BY THE COURT. On the authority of *Meyer v. Porter*, 2 PAC. REP. 884, judgment reversed and cause remanded, with direction to the court below to overrule the demurrer and permit defendant to answer.

64 Cal. 467

PEOPLE v. McDOWELL.

Filed January 22, 1884.

In a prosecution for murder, evidence is admissible to show that defendant had in his possession a weapon which might have caused the wounds on the body of the deceased.

Testimony of witnesses is admissible as to where deceased was supposed to have been killed, if merely for the purpose of locating the spot as a foundation for further examination.

Where the whole charge to the jury is unobjectionable, the fact that certain portions of the charge, when segregated, are objectionable, is not ground for reversal of the judgment.

In bank.

Appeal from the superior court of San Bernardino county.

This was an appeal from a judgment of the superior court, convicting the defendant of murder in the first degree. Appellant assigned, as errors of law, the admission of evidence that a slung-shot had been found in the possession of defendant, and testimony concerning an interview with him on the night before the arrest, relating to such slung-shot, without directly connecting the slung-shot with the crime; the admission of testimony as to the place where the crime was said to have been committed, on the ground that it was hearsay; and the portions of the charge of the court set forth in the dissenting opinion.

Byron Waters and *Q. S. Sparks*, for appellant.

R. E. Bledsoe, for respondent.

MYRICK, J. The testimony of the witness Hicks as to the slung-shot in the possession of the defendant, and as to the statement made by defendant, was relevant and material, because there was evidence tending to show that the wounds inflicted upon the person of deceased might have been caused by such an implement. The statements of the witnesses Wixon, Rice, and Cheatham, as to the place where the deceased was supposed to have been killed, were for the purpose, merely, of locating the spot, as foundation for further examination, as was so stated. While there are certain portions of the charge of the court below which, segregated, are objectionable, still when taken in connection with the context, as they must be, we think it cannot be fairly said that there was on the part of court any invasion of the province of the jury.

Judgment and order affirmed.

We concur: MORRISON, C. J.; ROSS, J.; MCKEE, J.; MCKINSTRY, J.; THORNTON, J.

SHARPSTEIN, J., *dissenting*. I dissent. In one part of the charge of the court this language occurs:

"The guilt of the prisoner rests upon evidence of his own declarations; also evidence tending to show that the dead body of the deceased was found with marks of violence and wounds upon it, and other circumstances tending to connect the defendant with the cause of her death.

"The conclusion that the prisoner is the person who committed the murder, from all the facts and circumstances surrounding the killing, is a result of a process of reasoning which men exercise in almost every department of society, and in the practical affairs of life and experience."

If we assume, as I think we must, that the jury attached to this language the meaning which men ordinarily attach to it, I cannot see how we can escape the conclusion that the appellant is entitled to a new trial. The constitution (article 6, § 19) declares that "judges shall not charge juries with respect to matters of fact, but may state the evidence and declare the law." In this case the jury were told that the guilt of the prisoner rested upon evidence of his own declarations, and upon evidence tending to show other material facts and circumstances. And then the jury were informed that the conclusion that the prisoner was the person who committed the murder, from all the facts and circumstances surrounding the killing, was the result of a certain process of reasoning. The jury were certainly warranted in inferring from this that the court knew that somebody had arrived at that conclusion, and was familiar with the process by which it had been reached. The court stated conclusions, not facts. It told the jury what the guilt of the prisoner rested on, and by what process of reasoning the conclusion that he was the person who committed the murder was reached. If an error of this kind could be cured by giving other instructions which were free from error, it would seem to follow that no judgment could be reversed for errors in the charge of the court unless the entire charge was erroneous, which would rarely, if ever, occur in trials for murder, as the greater part of the charge usually given in such cases has become, as it were, stereotyped.

I think this judgment should be reversed.

(64 Cal. 435)

SWEENEY and others v. SUTRO and others.

Filed January 28, 1884.

Where, in pursuance of the mandate of a court, a city auditor issues a warrant in favor of the petitioner or his attorney, in the proceeding for *mandamus*, a *bona fide* purchaser from such attorney acquires a valid title as against said petitioner. Such a warrant is not a negotiable instrument.

In bank.

Cal. Rep. 1-4 P.—20

Appeal from the superior court of the city and county of San Francisco.

This was an action brought to recover of defendants a certain audited warrant on the city treasury, or its value. This warrant was for an account which had been duly allowed by the board of supervisors and had then been presented to the auditor for allowance, which was refused, but finally allowed under a writ of mandate directing him to audit it, and issue a warrant to the petitioners or their attorney. In accordance therewith a warrant was issued to J. P. Sweeny & Co., or M. J. Cobb, their attorney. The lower court found against the defendants, and that plaintiffs were entitled to the possession of said warrant. Defendants appealed, and thereon the judgment below was reversed by department 2 of this court, on the ground that as the warrant was issued to said Cobb under direction of this court, defendants, by purchase from him, acquired a good title to it, and were not bound to inquire further into the matter of title than to see that it conformed to the direction of the court.

E. J. Moore, for appellants.

J. B. Hart, for respondents.

BY THE COURT. In this cause the opinion of the department (2) will stand as the opinion of the court. 10 Pac. C. L. J. 788. We add this further remark: The decree cannot be said to be without jurisdiction. It may have been made by consent of the plaintiffs themselves. The defendants being innocent purchasers for value of Cobb, the judgment and order must be reversed, as directed in the opinion of the department. We do not see that, in coming to this conclusion, we have overruled any of the cases to which our attention has been called by counsel for respondents. We do not intend to hold that a warrant is a negotiable instrument.

We dissent: ROSS, J.; MCKINSTRY, J.; MCKEE, J.

Delay in prosecuting a proceeding on the part of certain creditors, to adjudge a debtor an insolvent, will be cause for the dismissal of the proceedings where delay is not accounted for and inexcusable.

Department 2.

Appeal from the superior court of Alameda county.

This was a proceeding on the part of certain creditors to have plaintiff adjudged an insolvent debtor, and for the surrender of all his estate for the benefit of his creditors. After various proceedings and delays, including an order to show cause why said debtor should not be declared an insolvent, which order was never served, and a subsequent order of a similar nature, the service of which was delayed, the proceeding was, on motion of said debtor, dismissed for inexcusable delay in the prosecution thereof. The creditors appealed from this order of dismissal.

R. W. Kent, for appellants.

Emil Nusbaumer and Welles Whitmore, for respondent.

THORNTON, J. In examining this cause we cannot come to the conclusion that the court below abused its discretion in dismissing the proceeding, which was brought by certain creditors of Kornahrens to have him adjudged an insolvent, and that a surrender of his property be made for the benefit of his creditors. The order of thirteenth of December, 1879, that Kornahrens show cause on the twenty-ninth of same month why he should not be adjudged an insolvent, etc., was never served. No steps were taken to have it served. This delay was unaccounted for and inexcusable. There was further delay in serving the subsequent order made on the eighth of September, 1880. This was not accounted for in any way. We are of opinion that this proceeding should have been proceeded with, without the frequent and unaccountable delays which took place. According to the provisions of the statute under which this proceeding was instituted, (St. 1875-76, p. 581,) all attachments upon the property of the debtor, levied within two months before the filing of the petition, are dissolved on the debtor's being adjudged insolvent. Section 6 of statute. Many other dispositions of property made by the debtor are also void, if made by him when insolvent or in contemplation of insolvency within two months before the filing of the petition by or against him. Section 8 of statute. To sustain the proceeding before us would put a stop to the dealings of the debtor with his creditors during the period of delay, and affect very injuriously other creditors not joining in the petition who may have secured liens by attachment upon the property of the debtor, and even payment of their claims. It was not the intention of the law-makers to allow such consequences to occur. The dealings of the debtor with his creditors would be interfered with to a degree which the law-givers never intended to permit. The petitioners, if they think proper, can commence their proceedings anew.

The order must be affirmed.

We concur: SHARPSTEIN, J.; MYRICK, J.

2 Cal. Unrep. 256

BURT and others v. COLLINS and others.

Filed January 29, 1884.

A partnership is not liable for goods sold and delivered to one partner in his individual capacity, though the items be charged in the partnership account.

In bank.

Appeal from the supreme court of San Bernardino county.

This action was brought to recover of defendants, doing business of sheep-raising, as partners, under the name of G. A. Collins & Co., a balance on an account of goods sold and delivered. There was evidence that a portion of the goods had been purchased by Collins in his individual capacity and charged to the firm account. The court found the fact of the partnership and of the sale of the goods to the firm, and thereon rendered judgment against defendants. Defendants appealed from this judgment.

Brunson & Wells, for appellants.

Bicknell & White, for respondents.

MYRICK, J. Finding 3 is not sustained by the evidence. The evidence of B. F. Burt, one of the plaintiffs, found on page 44 of the transcript, shows that when the account was opened with Collins the object of using the firm name of G. A. Collins & Co. was for the personal convenience of Collins in his subsequent settlement with the herders and Mrs. Bouton, and not with the expectation that the account was the account of the firm. Besides, many of the articles sold (and charged in the account of the firm) were for the use of Collins and his family, and bore no relation to the business of the firm; and the plaintiffs did not, on the trial, segregate these items from the general account, nor show which items of the general account were for the benefit of, or went to the use of, the firm.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MORRISON, C. J.; ROSS, J.; MCKINSTRY, J.

64 Cal. 503

BLOOM v. CITY AND COUNTY OF SAN FRANCISCO.

Filed January 29, 1884.

The city and county of San Francisco is liable in an action for injuries to the business and health of the owner of land, caused by the flowing of refuse matter from its hospital onto such land, although no claim for compensation has been presented to the city board of supervisors for allowance.

In bank.

Appeal from the superior court of the city and county of San Francisco.

This was an action brought for the abatement of a nuisance, and for damages for injuries resulting therefrom. The nuisance consisted in permitting the excrements, secretions, filth, and refuse from the city and county hospital to flow onto plaintiff's land, thereby poisoning the atmosphere, endangering the health of those in contact with it, polluting plaintiff's well, and injuring his business. The defense was set up that plaintiff had never presented his claim for compensation to the board of supervisors. Judgment was rendered for plaintiff. Defendant appealed.

John L. Murphy, for appellant.

Joseph Leggett and Mich. Mullany, for respondent.

BY THE COURT. We think the city and county of San Francisco had such proprietorship of the city and county hospital as rendered it liable for damages in the case as presented in the transcript. We also think the claim of plaintiff was not a claim to be presented to the board of supervisors before an action could have been maintained.

Judgment and order affirmed.

2 Cal. Unrep. 257

HEINLEN v. ERLANGER and others.

Filed January 29, 1884.

Where a default has been entered against one of two defendants, for failure to answer the original complaint, the failure to serve amended complaints on such defendant will not be ground for reversal of the judgment, where the record does not show that such amended complaints were not served.

Department 1.

Appeal from the superior court of Tulare county.

v.3,no.2—9

E. J. Edwards, for appellants.

Jacobs & Merriam, for respondents.

BY THE COURT. In an action to foreclose a mechanic's lien, Erlanger and Jacob were made parties defendant,—Erlanger as the contractor for whom the work was done and to whom the materials were furnished, and Jacob as the person claiming the property sought to be charged with the lien. To the original complaint Jacob demurred, but Erlanger made no appearance and his default was duly entered. Subsequently, the complaint was amended five times. To the fifth amended complaint Jacob answered, and upon these pleadings a trial was had. In the brief of appellants it is said that none of the amended complaints were served on Erlanger, for which reason, it is contended, the judgment against him must be vacated; and, further, that without a personal judgment against Erlanger, there can be none foreclosing Jacob's interest. The reply, which is a good one, is that it does not appear from the record that there was a failure to serve the amended complaint on both defendants.

Judgment and order affirmed.

2 Cal. Unrep. 258

CRITES *v.* WILKINSON.

Filed January 29, 1884.

Where there is no evidence to support the findings of the court below, the judgment will be reversed.

Department 1.

Appeal from the superior court of Kern county.

This was an action for damages and for an injunction to restrain defendant from diverting the flow of water in a creek from ditches running over plaintiff's land,—plaintiff alleging to be owner of such water-right by prescription. Defendant denied plaintiff's title to such water-right. The court found plaintiff to be the owner of such water-right, and entitled to the injunction prayed for. Defendant appealed.

Z. G. Peck and *J. W. Freeman*, for appellant.

R. E. Arick, for respondent.

BY THE COURT. We have read the record attentively, and find no evidence to support the finding of the court below, to the effect that

the plaintiff acquired the right to divert from the stream mentioned in the record 100 inches of its water, measured under a four-inch pressure. The judgment securing him that right, as well as the order refusing the defendant a new trial must therefore be reversed.

Judgment and order reversed, and cause remanded for a new trial.

RATHGEB v. DASSO.

Filed January 29, 1884.

In questions on the weight of evidence, where the evidence is conflicting, the judgment of the lower court will be affirmed.

Department 1.

Appeal from the superior court of Calaveras county.

G. N. Williams, and *J. B. Reddick*, for appellants.

Cyril V. Grey, for respondents.

By THE COURT. The case as presented is one of evidence, and we cannot say that the findings of the court below are unsustained.

Judgment and order affirmed.

65 Cal. 96

CLARKE v. HUNDLEY, Judge, etc.

Filed March 3, 1884.

Where the defendant claims affirmative relief, growing out of matters in the plaintiff's complaint, the plaintiff cannot dismiss the action on his own motion.

Department 2.

George Cadwalader, for petitioner.

J. D. Goodwin, for respondent.

MYRICK, J. This is an application for a writ of mandate requiring the respondent, as judge, and the court in which he presides, to proceed with the trial of a case. Eleanor Murdock, as administratrix of her deceased husband, commenced an action against the petition-

ers herein, as defendants, for an accounting, by reason of matters set forth in her complaint, and to obtain a decree that the said defendants convey to her certain real estate which had been conveyed to them by plaintiff's intestate as security for certain moneys; alleging that the amounts received by the defendants and the value of use and occupation to be sufficient to pay off the indebtedness. The defendants answered, averring further advances and the payment of expenses by them of more than the amounts received, claiming a balance and the original amount loaned to be still due, and asked for an accounting, and that the real estate conveyed as security as above mentioned be sold to satisfy the amount due them. This action was pending in the court in which the respondent presides. While so pending, and before October 10, 1883, the cause was set down for trial on the twenty-ninth of October, 1883. On said tenth of October the plaintiff's attorney filed with the clerk a paper in which it was stated that "the plaintiff dismisses the above entitled action at the costs of said plaintiff, and the clerk of said court is hereby requested to enter such dismissal in his register of said actions." He also filed another paper in which he moved the court to dismiss the action at plaintiff's cost without prejudice. Notice of the motion was given, and a hearing thereon was had October 18th, and denied. No order for or relating to the dismissal appears on the register, but in the blotter are entries of items of clerk's costs, including the papers above referred to. On the twenty-ninth of October, the day on which the cause had been set down for trial, the parties appeared by counsel, and the plaintiff objected to the trial of the cause proceeding, on the ground that she had dismissed the action by filing the papers first above referred to. The court declined to proceed with the trial, for the reason that the action of the plaintiff had dismissed the suit, and there was no cause pending before the court. We are of opinion that the plaintiff did not, and that she could not, dismiss the action of her own motion. The defendants had averred matter upon which they sought affirmative relief, growing out of the action set forth in the plaintiff's complaint. See sub. 1, § 581, Code Civil Proc.

Let the writ issue as prayed for.

We concur: SHARPSTEIN, J.; THORNTON, J.

(65 Cal. 97)

SHINN v. CUMMINS.

Filed March 6, 1884.

While it is advisable in all cases to comply literally with the provisions of the Code, nothing short of a substantial departure therefrom can be properly held fatal to a proceeding under it.

The attorney's name should be indorsed on the back of the summons, but if found only on the face, the omission cannot prejudice the defendant.

The pendency of a motion to set aside "the pretended summons and complaint" does not extend the time named in the summons for answering the complaint.

Department 2.

J. D. Goodwin and C. G. Kelley, for appellant.

C. McClaskey, for defendant.

SHARPSTEIN, J. Appellant insists that it is essential to the validity of a summons that the name of the plaintiff's attorney be indorsed on it. The Code provides that "the name of the plaintiff's attorney must be indorsed on the summons." Code Civil Proc. § 407. There was not in this case a literal compliance with that provision. The name of the plaintiff's attorney appears on the *face* and not on the *back* of the summons. Therefore, it is not *indorsed on* the summons. And if we could see that the defendant might possibly be prejudiced by this circumstance, it would be our duty to reverse the judgment. But we cannot. The object of the law doubtless is to have the name of the plaintiff's attorney indorsed on the summons, so as to inform the defendant who such attorney is. While it is advisable in all cases to literally comply with the provisions of the Code, nothing short of a substantial departure therefrom can properly be held to be fatal to a proceeding under it. "Its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice." Id. § 4.

The pendency of the defendant's motion "to dismiss, vacate, and set aside the pretended service of summons and copy of complaint" did not extend the time specified in the summons for answering the complaint. When the default was entered, there had been no appearance in the case by the defendant, and we are unable to discover any ground on which the judgment should be reversed.

Judgment affirmed.

We concur: MYRICK, J; THORNTON, J.

SUPREME COURT OF CALIFORNIA.

2 Cal. Unrep. 283

Ex parte MAKINNEY.

Filed March 8, 1884.

Where a party to a suit is ordered to pay the jury fees, the court has not the power to order the clerk to issue certificates for their payment out of the county treasury, upon the mere neglect, failure, or refusal of the party to comply with the order by paying as required.

*Habeas corpus.**J. M. Lesser*, for petitioner.

THORNTON, J. Luke Lukes sued J. Bernheim and others in the superior court for the county of Santa Cruz, and on his demand a jury was called and impaneled. The trial of the cause proceeded for five days before the court and jury, and the jury, failing to render a verdict, was on the nineteenth of October, 1883, discharged. The court entered an order that the plaintiff pay the jury fees, amounting to \$120, in said action, and that all proceedings be stayed in the action until the fees are paid by plaintiff. The court further directed, in this order, that if the fees above mentioned were not paid by plaintiff that the clerk issue a certificate to all of the jurors of the time and mileage to which each juror is entitled to pay, and the same be paid out of the county treasury, as is provided in section 28 of "An act to regulate fees of office," etc., approved March 5, 1870, St. 1869-70, pp. 148, 177. It further appears that the clerk, petitioner here, refused to obey this order, whereupon the court adjudged him guilty of contempt, and ordered that he be imprisoned until he comply with it.

The petitioner, Makinney, applies to me to be discharged from this imprisonment. I think that the court in making the order exceeded its power. Such order is only authorized under certain special circumstances, and, when those circumstances do not exist, the court has no power to make it. The proceedings under the statute of 1870, in regard to jury fees, is in its nature special, and is not within the general jurisdiction of the court. It does not appear that Lukes is without means and unable to pay this money. As the case is presented here, it is one of neglect or failure to pay by one who is ordered to pay. It may be that he had abundant means to pay, and willfully and obstinately refused to pay. Under these circumstances, the court had no power to require the clerk to issue certificates as required in the order. It may be that if the court had exercised the powers it

had a right to employ,—directed a writ of execution to be issued on the order that the plaintiff pay, against the property of plaintiff, had had it placed in the hands of the sheriff, who had made a faithful and diligent effort to make the money, and had failed, that the court might then order the clerk to issue such certificates; but certainly it had no power to make such order on the mere failure, or neglect, or refusal of the plaintiff to comply with the order by paying as required.

As the court was unauthorized by law to make the order as to the issuance of the certificates required by it, the imprisonment of the petitioner was without authority, and he must, therefore, be discharged; and it is so ordered.

SUPREME COURT OF CALIFORNIA.

65 Cal. 100

PEOPLE v. MAJORS. (No. 10,900.)

Filed March 13, 1884.

The Penal Code gives no right of appeal from an order denying a motion in arrest of judgment, nor from a judgment upon a plea of former conviction. A motion for a new trial is not authorized until after all the issues of fact have been tried, and hence there can be no appeal from an order denying such a motion.

Department 1.

The Attorney General, for respondent.

J. B. Lamar, for appellant.

By THE COURT. To an information filed August 27, 1883, charging the defendant with the murder of one Archibald McIntyre, in Santa Clara county, on the eleventh of March, 1883, defendant, without a plea of not guilty, pleaded a former judgment of conviction of the same offense. Upon the plea so interposed a trial was had and a verdict rendered for the people. Defendant then moved in arrest of judgment, and also made a motion for a new trial, both of which motions were denied by the court, and thereupon judgment was given against him on the plea. He appeals from the judgment, from the order denying his motion in arrest of judgment, and also from the order refusing him a new trial. It is clear that there is no authority for the appeal from the judgment, nor for that from the order denying the motion in arrest of judgment. Sections 1237 and 1259 of the Penal Code read:

"Sec. 1237. An appeal may be taken by the defendant (1) from a final judgment of conviction; (2) from an order denying a motion for a new trial; (3) from an order made after judgment, affecting the substantial rights of the party."

"Sec. 1259. Upon an appeal taken by the defendant from a judgment, the court may review any intermediate order or ruling involving the merits, or which may have affected the judgment."

Section 1237 does not give an appeal from an order denying a motion in arrest of judgment. The appeal from the order is therefore without authority, and must be dismissed. So, too, with respect to the appeal from the judgment upon the plea of former conviction. It is obvious that such a judgment is not "a final judgment of conviction." It only determines that the defendant has not been previously convicted of the offense of which he now stands charged, leav-

ing the question of his conviction or acquittal open, to be determined after a trial. With respect to the appeal from the order denying defendant a new trial, the statute does not contemplate a motion for a new trial until all the issues of fact have been tried. And inasmuch as the law did not authorize the motion for a new trial made by the appellant in the court below, it results that there can be no appeal from the order denying such a motion.

Appeals dismissed.

65 Cal. 101

PEOPLE v. FORSYTHE. (No. 10,927.)

Filed March 13, 1884.

Where evidence tends to prove a homicide excusable, it raises a conflict for the jury to determine, subject to the power of the court to grant a new trial. We cannot, then, on the ground of want of evidence to justify the verdict, disturb the order denying a motion for a new trial.

The reading of the decisions of this court to a jury is not commended, but not held to be error.

In bank.

The Attorney General, for respondent.

Buck & McQuaid, for appellant.

SHARPSTEIN, J. Although the defendant pleaded not guilty to the charge of murder, he did not attempt on the trial to controvert the fact that he actually killed the deceased. He endeavored then to prove that the homicide was committed in self-defense, and justifiable. He now claims that this was so clearly proven as to justify this court in reversing the judgment on the ground that the verdict of the jury, which was, guilty of manslaughter, was not justified by the evidence. One witness testified to having seen the defendant approach deceased from behind and strike him on the head with a club. Another, who was near the scene of the homicide, testified that he heard a noise which sounded to him like a blow; that he looked in the direction from which the noise came and saw the deceased falling. Two other witnesses testified that they, too, heard the blow and saw the deceased fall, and that they heard the defendant say that he intended to kill the deceased. These witnesses testify to having been within a few feet of the scene of the homicide when it was committed. Another witness—a physician—testified that he was requested by defendant to examine the deceased and ascertain how badly he was hurt, and that he, witness, at that time asked defendant why he had done it, and that the latter replied, "Damn him, he sassed me." The

fact that the death of deceased was caused by a blow struck by defendant with a club is not controverted; and we have referred to the testimony of these witnesses for the purpose of showing that none of them saw deceased do or say anything to defendant at the time of or immediately preceding the striking of the mortal blow which would justify or excuse it. The evidence of these witnesses tended to prove that deceased was quietly walking away from the barn, where the defendant was employed, when the latter approached him from behind and dealt the mortal blow. We cannot say that the jury might not have fairly inferred from the evidence of the prosecution that deceased was wholly unconscious of the fact of defendant's being on the premises while he, deceased, was there. There is no evidence that he saw defendant or inquired for him. He sought the proprietor of the barn, and was killed while in the act of leaving the premises, in a perfectly peaceable manner, according to the testimony of eye-witnesses. "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." Penal Code, 1105. We are unable to find any "proof on the part of the prosecution" which "tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." On the contrary, it tends to show the exact reverse. If the defendant introduced evidence which tended to prove that the homicide was justifiable or excusable, it simply raised a conflict for the jury to determine, subject only to the power of the court below to grant a new trial. Under such circumstances we cannot, on the ground of insufficiency of the evidence to justify the verdict, disturb the order denying the motion for a new trial.

The exception to the ruling of the court in sustaining the objection of the district attorney to defendant's counsel questioning a witness for the prosecution, on cross-examination, in regard to the desperate character of the deceased, and as to what the witness had told defendant of threats made by deceased against defendant sometime before the homicide, must be overruled. None of these matters were gone into on the direct examination of the witness, and could be introduced by the defendant only for the purpose of proving circumstances of mitigation, or to justify or excuse the homicide. As to what occurred at the time and place of the homicide, the defendant's counsel appears to have had all the latitude he desired in his cross-examination of the witness.

There was evidence tending to prove that the defendant was absent from home soon after the homicide, and that some three weeks afterwards he was arrested in another county. This, we think, justified the court in giving the instruction it gave in regard to the flight

of a person accused of crime. As we construe the instruction, it neither assumes the guilt nor flight of the defendant. *People v. McDowell*, ante, 124.

The district attorney was permitted, against the objection of defendant's attorney, to read, while summing up to the jury, some portions of an opinion filed by this court in a late case. No case is cited, and we know of none in which it has ever been held that doing so was error. Still we are not disposed to commend the practice.

Judgment and order affirmed.

We concur: ROSS, J.; MORRISON, C. J.; MCKINSTRY, J.; MYRICK, J.; MCKEE, J.; THORNTON, J.

2 Cal. Unrep. 285

NISSEN *v.* BENDIXSEN. (No. 9,088.)

Filed March 14, 1884.

When the original transcript does not show that the notice of appeal was served on plaintiff's attorney of record, and a motion to dismiss on that ground is made, such motion may be overruled if the defendant, upon leave, files a certificate of the clerk of the court below showing that proof of service of such notice is on file in the clerk's office.

Department 2.

S. M. Buck, for appellant.

J. J. De Haven, for respondent.

By THE COURT. The original transcript did not show that the notice of appeal was served on the plaintiff's attorney of record, and a motion to dismiss on that ground was made by said attorney. When the motion was called up, the defendant's attorney suggested diminution of record, and asked and obtained leave to file a certificate of the clerk of the court below showing that proof of service of said notice on plaintiff's said attorney of record is on file in the office of said clerk.

Motion to dismiss denied.

65 Cal. 111

KINSEY v. KELLOGG. (No. 8,995.)

Filed March 21, 1884.

In 1876, when the duties of clerk, auditor, and recorder of Humboldt county were discharged by a single person, the legislature fixed the compensation of the clerk for all services required of him in any one of his official capacities at \$5,000. Humboldt county was afterwards constituted by the legislature a county of the second class, whereby the several offices would be occupied by different persons. *Held*, that the clerk was not entitled to the full sum of \$5,000, though the provision of the statute had never been expressly repealed.

In bank.

S. M. Buck, for appellant.

J. J. De Haven, for respondent.

McKINSTRY, J. February 28, 1876, the following legislative act was approved by the governor:

"Section 1. The county clerk of Humboldt shall receive for all services required of him as county clerk and *ex officio* clerk of the district court, probate court, board of supervisors, board of equalization, auditor, and *ex officio* county recorder, a salary of \$5,000 per annum, which salary shall be in full for all services required of and performed by him, and it shall be paid monthly out of the county treasury. He shall collect and safely keep all fees, of whatever kind or nature, allowed him by law for services rendered by him in his *several official capacities*, and upon the first Monday of each and every month shall pay the same over to the county treasurer of said county, and at the same time shall make out and file with said treasurer a full and accurate statement under oath of all fees, of whatever kind or capacities, for the preceding month.

"Sec. 2. This act shall take effect and be in force from and after the first Monday in March, eighteen hundred and seventy-eight. And all acts and parts of acts, so far as they conflict with the provisions of this act, are hereby repealed." St. 1875-76, p. 81.

By the census taken in the year 1880, Humboldt was found to contain a population exceeding 8,000 and less than 20,000 inhabitants. The county was organized as a county of the second class, and since July 1, 1881, has had at all times a board of supervisors consisting of five members, and other officers prescribed for counties of the second class. Pol. Code, 4006, 4007, 4025. The board of supervisors did not, at any time prior to the election of plaintiff as county clerk, as hereinafter mentioned, unite or consolidate the office of county clerk with those of recorder or auditor, or either of them. The board of supervisors, by an ordinance duly adopted on the eighth day of July, 1882, united and consolidated the offices of recorder and auditor, and caused such ordinance to be duly recorded and published for

three months before the general election held November 7, 1882. Pol. Code, 4106. At such general election plaintiff was elected county clerk, and defendant, recorder and *ex officio* auditor, of Humboldt county. Plaintiff entered upon the discharge of the duties of county clerk on the first Monday of January, 1883, and defendant commenced to act as recorder and auditor on the eighth day of January, 1883, and has ever since discharged the duties of said office. On the eighth of February, 1883, the board of supervisors of Humboldt fixed and determined the annual salary of the clerk at \$2,700. After plaintiff had served one month as county clerk, and on the eighth of February, 1883, he applied to defendant for a warrant on the treasury of the county in the sum of \$416.66, as the amount of his salary for the preceding month. Defendant refused to draw the warrant for the amount demanded, or, as alleged in the complaint, "for any amount whatever." There is, however, no averment in the complaint that plaintiff demanded a warrant for a less sum than \$416.66, and in his answer defendant offers to draw a warrant for plaintiff's salary at the rate of \$2,700 per annum. The court below denied the writ of mandate and dismissed plaintiff's application therefor. The cause was argued here, by counsel for both parties, on the *assumption* that the matters set forth in the answer as facts are true.

On the eighth day of March, 1876, the act following was approved:

"Section 1. Humboldt county is hereby constituted a county of the second class, within the meaning of and for the purposes designated by section four thousand and twenty-two of the Political Code.

"Sec. 2. The board of supervisors of Humboldt county must redistrict said county into five supervisor districts, as nearly equal in population as may be. At the first election hereafter, at which any supervisor is by law to be elected, supervisors must be elected for each new district to be created by virtue hereof." St. 1875-76, p. 333.

It is contended on the part of the plaintiff that the statute of February 28, 1876, on which he relies, provides for a salary to be paid the *county clerk* "in full for all services required of and to be performed by *him*," and that the specification of duties which precedes this provision cannot take from the language quoted any of its force or meaning. It is also argued that because some duty formerly performed by the clerk has, without the consent of that officer, been imposed by an inferior board upon another person, it does not follow that such board can deprive the clerk of any portion of his salary; that the law only authorizes the supervisors to fix the compensation of a county officer not fixed by the Political Code, or by general or special laws. Pol. Code, 4046.

On the part of defendant (respondent here) it is contended: *First*. The offices of clerk, recorder, and auditor are distinct offices, though held by the same person by virtue of an election to one. *People v. Durick*, 20 Cal. 94. *Second*. At the date of the passage of the act of 1876 the same person was required to fill all the offices named in

the county of Humboldt, and in view of the existing state of facts—taken in connection with the language of the act itself—the intention of the legislature is manifest to fix the compensation of \$5,000, not for the discharge of the duties of clerk alone, but for the discharge of the duties of recorder and auditor as well. *Third.* The clerk having ceased to be recorder and auditor, the law which fixed a compensation for all his services, as clerk, recorder, and auditor, must be held to have ceased to have a practical operation. A law must be applied according to its manifest intent, and a thing, even within the *letter*, is without the statute if without the *intention*. We think the positions of defendant well taken. In 1810 the congress of the United States passed an act fixing the salary of consul at Algiers at \$4,000 a year. Algiers became a province of France, and most of the powers and duties of consul at Algiers, as prescribed by the act which authorized his salary, ceased.

In *Mahoney v. U. S.* the supreme court of the United States said:

“When the act was passed, Algiers was a part of one of the Barbary states of that name, and it is evident, from an examination of its provisions, that the act was intended to apply to a consulate at that place only so long as it belonged to one of the Barbary powers.” 10 Wall. 65.

Here, when the act of 1876 was passed, there was a person who was discharging the duties of clerk, recorder, and auditor, and unless subsequent legislation should require otherwise, one person would continue to fill the three separate offices. It was to this condition of things that the law was made applicable, and the compensation provided by it was provided as compensation to the clerk, the recorder, and the auditor. The law did not determine how much should be paid to each of the three officers,—a matter of no consequence so long as the three offices were in one man. But when the organization of the county government was changed, and the person who was clerk was not auditor nor recorder, it is clear that no one of the three officers was entitled to receive the compensation intended for the three; and as the act of 1876 did not provide for the event, the act, by force of its own expressions, became inoperative when the event occurred.

As there was no operative law fixing the compensation of the county clerk after Humboldt became organized as a county of the second class, the board of supervisors had authority to fix the compensation of that officer. Pol. Code, § 4046, sub. 18.

Judgment affirmed.

We concur: ROSS, J.; SHARPSTEIN, J.; THORNTON, J.; MYRICK, J.; MORRISON, C. J.; MCKEE, J.

65 Cal. 116

KIMBALL *v.* STORMER. (No. 8,701.)

Filed March 21, 1884.

Actual possession of a portion of a tract of land under color of a deed does not amount to a constructive possession of another portion thereof, which is entirely uninclosed. The ouster required to cause the statute of limitations to run must be notorious.

In an action of ejectment, where the court made an attempted finding in favor of the defendant, on the ground that he had acquired title by virtue of the statute of limitations, but failed to find upon the question of plaintiff's original title, *held*, that as the finding with respect to adverse possession was not justified by the evidence, judgment must be reversed.

In bank.

W. F. Goad and *W. C. Belch*, for appellant.

A. L. Hart, for respondent.

McKINSTRY, J. The appeal is by plaintiff from a judgment and order denying a new trial in an action of "ejectment." The complaint is in the usual form; the answer denies the averments of the complaint, and avers that the cause of action is barred by sections 318 and 319 of the Code of Civil Procedure. A jury having been waived, the action was tried by the court. Within 30 days after the cause was submitted for decision the court filed with the clerk a paper writing in words following:

"DECISION.

"[Superior Court, County of Colusa.]

"*Thos. E. Kimball v. E. I. Stormer.*

"Under the testimony introduced I am of the opinion that at the time this action was brought the defendant had acquired a title to the premises in controversy by virtue of the provisions of the statute of limitations. Judgment is therefore ordered for the defendant."

[Signed by the Judge.]

Thereupon judgment was entered. [Title of court and cause.] "This cause coming on regularly for trial on the ——— day of ———, 1881, plaintiff and defendant appeared by their respective counsel, and the cause was tried by the court without a jury, a jury having been waived by the parties to said action. The evidence of plaintiff and defendant was introduced in due form, and the cause subsequently argued to the court by the respective counsel, and then taken under consideration by the court; and the court having fully considered said cause, and being fully advised as to the law and the evidence, *makes and files its written decision* in favor of the defendant and against the plaintiff, and orders judgment accordingly. Wherefore," etc.

The Code of Civil Procedure provides: "Upon the trial of a question of fact by the court, its *decision* must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision. In giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly." Sections 632, 633.

From the "decision" filed it is apparent the court below intended to find that defendant had been in adverse possession for more than five years, and *therefore*, as a conclusion of law, that he was entitled to judgment. Finding thus, the court deemed it unnecessary to find whether the plaintiff did or did not have title prior to the running of the statute. If the finding as to adverse possession had been sufficient, and the evidence had sustained it, we would affirm the judgment, holding that the question whether the plaintiff had or had not title originally was immaterial. But, as we shall see, the evidence does not justify the finding in favor of defendant upon the plea of the statute of limitations. The case is to be treated, therefore, as one in which the court below, upon sufficient evidence, found that the defendant had acquired title by adverse possession, but failed to find whether the plaintiff had title and right of possession independently of the question of adverse possession. We are not prepared to say that the evidence clearly and unmistakably shows the plaintiff had no title to the premises in controversy, and that defendant is the owner of them. We expressly decline to determine that question, however, leaving it to be passed upon by the court below. It has been so often held here that when the court below has failed to find upon any material issue made by the pleadings, the judgment must be reversed, that cases need not be cited as authority on that point.

It is no objection to the reversal of the judgment, for want of finding upon a material issue, that the finding with respect to the statute of limitations is not in form a *sufficient* finding. If the court, in addition to the finding with respect to the limitation, had found the plaintiff was the owner, etc., or facts from which the ownership of plaintiff conclusively followed, we would, perhaps, reverse the judgment on the ground that there was no finding such as is required by law upon the fact of adverse possession. But the writing filed by the court below as its "decision," or findings,—which is a very different thing from an *opinion*,—is always set up here, and constitutes a part of the judgment roll. Code Civil Proc. 670. It is only because the findings, sufficient or insufficient, are sent up as a part of the judgment roll, that we can determine whether a particular finding is or is not sufficient. In one sense, an insufficient finding is not a finding, because it is not determinative of an issue; but in another sense an *attempted* finding found in the decision, filed as such by the court below, is a finding. It is to be treated as a finding in so far as it enters into the record to be reviewed in this court, and in that it clearly shows that findings were not *waived* by the parties. As has been held

here, in support of the presumption that the trial court has done its duty, we will (where there are *no* findings) presume that findings were waived, unless the contrary is made to appear by bill of exceptions. But this presumption cannot have force as against a writing on its face designated the "decision," filed by the court below, clearly intended to be a finding upon a material issue, and showing that the court ordered a judgment in favor of defendant *because* the evidence proved that one of the pleas of the defendant was true. The court below having attempted to find upon one of the material issues, (the evidence not sustaining the finding,) and having failed to find upon another material issue, the judgment must be reversed.

We return to the question, did the evidence justify the finding in favor of defendant upon the plea of the Code limitation? In considering this question, in the absence of a finding that plaintiff was or was not the owner or entitled to the possession of the demanded premises, or of facts showing such right of possession, we must assume that plaintiff deraigned title from the *Jimeno* grantees, which is the right to establish which the evidence on the part of the plaintiff was addressed. The action was commenced April 15, 1875. It is admitted that the demanded premises are entirely within the limits of the *Jimeno* grant. There is no evidence that defendant ever had actual possession of the *Jimeno* grant, or of any part of the lands claimed by plaintiff, until the year 1872. Prior to that year the land in controversy was an open common, on which ranged the stock of defendant and other persons. There was evidence tending to prove that on divers occasions defendant had cut up the dead timber or down trees and removed the wood from the land. Such fugitive acts did not of themselves constitute an adverse possession.

It is claimed, however, that defendant had been in adverse possession of the land in controversy for more than the statutory period, because in the year 1868 he had received from a stranger a deed purporting to convey a tract "known as the Mizner tract," which comprehended within its bounds land lying without the *Jimeno* grant, and also land lying within the *Jimeno* grant,—the latter including the premises here demanded,—and had been in actual possession of the portion of the land *without* the *Jimeno* grant for more than five years when this action was commenced. The question presented, therefore, is: Can a defendant who claims under color of title a larger tract, which includes the land to which plaintiff has shown title in fee, establish an adverse possession as to plaintiff's land (which has remained vacant and unoccupied) by proving an actual possession of a portion of the larger tract,—such possession not extending to any of the land claimed by plaintiff?

The fourth subdivision of section 323 of the Code of Civil Procedure provides: "Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed according to the usual course and custom

of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated." It is apparent that, for a person to acquire a constructive adverse possession of land, he must actually oust the true owner of some part of his land. The owner is not disseized of his land merely because one stranger may pretend to convey it to another, and he is not driven to any assertion of his legal rights because one with or without title shall occupy lands not *his*. It is but necessary to state the facts to demonstrate that the fourth subdivision of section 323 does not apply to them.

Even, however, if the acceptance of a deed of the "Mizner tract" by defendant, and his actual possession of a part of that tract, could be held to create a presumption that he asserted an absolute right to the whole, "exclusive of any other right," such presumption would, in the case before us, be overcome by defendant's own testimony. As a witness he stated that prior to 1872 he had fenced only the portion of the land claimed by him lying to the west of the Jimeno grant, and west of the land claimed by plaintiff, "knowing there was a dispute as to the title of this land now in controversy;" that he "had not thoroughly understood how it was,—he didn't want to go too far until he would find out;" and that in 1872 he inclosed the land claimed by plaintiff, "when he found out that Col. Hager (alleged agent of plaintiff) never had any possession." These declarations of defendant prove he did not assert an absolute and unqualified right to the land in controversy until, at least, the year 1872.

Judgment and order reversed, and cause remanded for a new trial.

We concur: ROSS, J.; SHARPSTEIN, J.; THORNTON, J.; MYRICK, J.; MORRISON, C. J.

65 Cal. 110

MANUEL v. ESCOLLE. (No. 7,915.)

Filed March 27, 1884.

In an action by an administrator of a deceased partner to obtain an accounting and settlement of the partnership affairs, amounts drawn from the firm by the deceased partner may be proved and allowed as an offset, although such amounts have not been presented to and allowed by the administrator and judge in probate.

Department 2.

Gregory & Shipley, for appellant.

S. F. Geil, for respondent.

BY THE COURT. The defendant and plaintiff's intestate were partners, and the complaint is filed to obtain an accounting and settle-

ment of the partnership affairs; the plaintiff alleging that there is due from defendant the sum of \$3,192.22. An accounting was had, and the court found a balance of \$265.90 due plaintiff, for which judgment was rendered. In arriving at this conclusion the court heard evidence regarding sums drawn from the partnership by the plaintiff's intestate during his life-time, and charged the plaintiff, as representative, therewith. Plaintiff claims this to be error, and claims that defendant, in order to have the benefit of the allowance, should have presented to the administratrix and judge, for allowance and approval in course of administration, the amount which he claimed as an allowance in this action. We are of opinion that the allowance and approval by the administratrix and judge were not prerequisites to the right of the defendant to have the accounts adjusted, and the amount claimed allowed as an offset in the accounting. Section 1585, Code Civil Proc., seems to be clear and explicit as to the powers and duties of a surviving partner.

Judgment and order affirmed.

2 Cal. Unrep. 287

PEOPLE *ex rel.* DOUGHERTY *v.* BOARD OF ELECTION COM'RS, Etc.
(No. 9,310.)

Filed March 17, 1884.

The office of "supervisor, first board," does not exist in the city and county of San Francisco.

See *Desmond v. Dunn*, 55 Cal. 248.

In bank.

John J. Coffey, for appellant.

Wm. Craig, for respondent.

MYRICK, J. The petitioner, at a general election held in the city and county of San Francisco, November 7, 1882, received votes for supervisor, first board, and he claims that under the clause of section 7, art. 11, of the constitution of 1879, which reads as follows: "In consolidated city and county governments of more than one hundred thousand population, there shall be two boards of supervisors or houses of legislation," etc.,—he was elected a member of the first board of supervisors, and is entitled to a certificate of election; that the clause above quoted is self-executing, and requires no legislation. The court below held that the office for which the votes were cast does not exist in said city and county. This court had occasion to consider this question in *Desmond v. Dunn*, 55 Cal., and its views thereon

will be found on pages 248, 249. The consolidation act of the city and county of San Francisco will (so far as the present question is concerned) remain in force until changed or superseded by proceedings under article 11 of the constitution.

Judgment affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.; ROSS, J.; MCKINSTRY, J.; MORRISON, C. J.

65 Cal. 107

PEOPLE v. RILEY. (No. 10,876.)

Filed March 17, 1884.

An order of commitment being made after examination, the transcription of the notes of the short-hand reporter is not essential to the jurisdiction of the court in order to proceed by information.

The decision upon a challenge for actual bias is not the subject of review on appeal.

The restriction by the court of the number of the defendant's peremptory challenges to 10 was proper, under the decision in *People v. Clough*, 59 Cal. 438.

Where the defendant is convicted of robbery, an error in the charge relating to the crime of grand larceny is not properly before this court.

In bank.

The Attorney General, for respondent.

Lyman J. Mowrey, for appellant.

MORRISON, C. J. The defendant was informed against in the superior court of the city and county of San Francisco, and on the trial was found guilty of the crime of robbery. On his appeal several errors were assigned, which we will briefly consider in their proper order:

First. It was claimed, on motion to set aside the information, that the trial court had no jurisdiction, and this pretension is based on the ground that there were no such preliminary proceedings in the case as to warrant a prosecution by information. We think this point is not well taken. It appears that a preliminary examination was had before a committing magistrate, and that at such examination the evidence was all taken down by a short-hand reporter, in pursuance of of an order of the court, but that the short-hand notes were not transcribed and filed with the court or the clerk thereof. In our opinion such transcription was not necessary to the jurisdiction of the court. The substance of the requirements of the constitution and statute was complied with. An examination was had and an order committing the defendant was made. The defendant could have had

a transcription of the short-hand notes if he had desired it, but he was not prejudiced in any *substantial right* by the failure of the short-hand reporter to write out his notes; and such transcription was not essential to the jurisdiction of the court. Const. art. 1, § 8. The district attorney was not obliged to wait until the short-hand notes were written out and filed before proceeding by information. Penal Code, § 809, sub. 5; section 809.

Second. The next alleged error relates to the action of the court in overruling defendant's objection to the juror Eastland, who was challenged for actual bias. Such a decision is not the subject of review on appeal, as has been frequently held by this court. *People v. Cotta*, 49 Cal. 166; *People v. Vasquez*, Id. 560; *People v. Taing*, 53 Cal. 602.

Third. The next objection raises a point frequently decided by this court, and fully settled so far as judicial decisions can settle any question. The mode of selecting a jury in a criminal case was clearly stated in the case of *People v. Scoggins*, 37 Cal. 676, and has been followed in *People v. Russell*, 46 Cal. 121, and also in *People v. Iams*, 57 Cal. 125. We are satisfied with the principle enunciated in the foregoing cases.

Fourth. As to the number of peremptory challenges to which the defendant was entitled. He claimed that he had a right to 20, but the court restricted him to 10. This was in accordance with the ruling of this court in *People v. Clough*, 59 Cal. 438, and to the ruling in that case we adhere.

Fifth. The last error relied upon, which we will notice, challenges the correctness of certain portions of the judge's charge to the jury. It may be conceded, for the purposes of the argument, that there *was* error in the charge, so far as the same related to the crime of grand larceny; but the defendant was convicted of the crime of robbery, and what the court said about that crime is properly before this court. The crime of robbery was defined by the court in the very language of the statute, and the objection to the charge is rather hypercritical than substantial. There is no such inconsistency in the charge as would justify this court in interfering with the judgment below. On the question of reasonable doubt the charge was strictly correct; and, in conclusion, we find no substantial error in the case.

Judgment and order affirmed.

We concur: MYRICK, J.; THORNTON, J.; SHARPSTEIN, J.; McKINSTRY, J.; ROSS, J.

SUPREME COURT OF CALIFORNIA.

65 Cal. 126

PEOPLE v. TURCOTT. (No. 10,944.)

Filed March 22, 1884.

The district attorney, in prosecuting a criminal case, may be permitted by the court to avail himself of the assistance of private counsel.

A charge to the jury is not erroneous on account of isolated sentences, if, taken as a whole, it conveys a correct view of the law of the case.

Erroneous instructions give the defendant no ground of complaint, unless prejudicial to his interests.

Irrelevant evidence may be excluded by the court, though not objected to by counsel.

In bank.

S. L. Terry, for appellant.

The Attorney General, for respondent.

Ross, J. The defendant was found guilty of murder in the first degree and sentenced to be hanged. The appeal is from the judgment. In his behalf it is contended—*First*, that the court below erred in permitting private counsel to assist the district attorney in the prosecution of the case. The practice of allowing district attorneys to have the assistance of other counsel in the prosecution of criminal cases has existed and been acquiesced in almost since the organization of the state, and this practice seems to have been sanctioned by legislative action. In prescribing the course of the trial the legislature has provided by the second subdivision of section 1093 of the Penal Code, that the district attorney *or other counsel for the people* must open the cause and offer the evidence in support of the charge, and by section 1095, that if the indictment or information be for an offense punishable with death, *two* counsel on *each* side may argue the cause to the jury. We think the point not well taken.

It is next claimed that there was error on the part of the trial court growing out of this circumstance: One Mrs. Morath, during her examination, testified that on the evening of the shooting, and some time after it occurred, she saw a Mrs. McCann and her brother searching in the yard of deceased's residence, and that the brother raised up with a shot-gun in his hand, which was taken from next the fence and near the gate; that this brother picked up the gun in a stooping position and walked to the back of the house, and two days afterwards she saw a young man named Adams unloading the gun, and that he put it in two pieces. No objection was taken to this evidence by the prosecution, but the court interposed and said that it did not

see the bearing of the testimony upon the case, and that therefore there was no necessity of proceeding further in regard to the gun. To this ruling defendant's counsel noted an exception, but made no response to the suggestion of the court that if he could show wherein the testimony in relation to the gun had any bearing upon the case it would be admitted. In its ruling in this particular there was no error on the part of the court below. In outlining his defense, the counsel for the defendant, in making his opening statement, put the defense upon the ground that at the time of the killing the deceased made a motion with his right hand as if to draw a revolver from his right hip pocket, and the defendant, believing his life to be in danger, thereupon fired the fatal shot; and such was the purport of the defendant's testimony. Under such circumstances the testimony with respect to the gun was wholly foreign to the case.

It remains to consider defendant's objections to the instructions of the court below. Some of these objections need not be remarked upon. The objection chiefly relied upon by the defendant's counsel relates to the character of evidence the jury were told was required to show circumstances of justification or mitigation, and in this connection it is claimed that the tenth instruction, given at the request of the defendant, is in conflict with certain portions of the charge of the court. We have given to the charge and the instructions careful consideration, and cannot so hold. There are few cases in which isolated sentences may not be taken and so grouped as to present a conflict. But to do this is not permissible. The sentences are to be read in connection with the context and the instructions, as a whole; and if, when so read, it appears that the jury was fairly and correctly instructed in the law governing the case, the judgment ought not to be reversed merely because there may be an apparent conflict between certain isolated sentences. Now, looking at the tenth instruction given at the request of the defendant, it certainly cannot be said that he has any right to complain. It reads:

"The defendant is not required to prove by a preponderance of evidence that the killing of Dietrich was justifiable. If from the evidence offered by the defendant, taken by itself, or in connection with that offered by the prosecution, the jury entertain a reasonable doubt whether or not the killing was done under such circumstances as to constitute it justifiable, then the jury should find the defendant not guilty."

The conflict claimed by counsel is between this instruction and that portion of the charge of the court wherein the jury was instructed that upon a trial for murder, the commission of the homicide being proved, the burden of proving circumstances of mitigation or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justified or excusable; and this he may show by preponderance of evidence merely. Conceding that if this instruction stood alone the word "may" should be

read "must," it should not be so read when taken in connection with the other instructions of the court, in which the jury was distinctly told that circumstances of mitigation, excuse or justification need not be proved by a preponderance of evidence. Such instructions were contrary to the ruling of a majority of this court in the case of *People v. Hong Ah Duck*, 61 Cal. 387; but as the error was in favor of defendant he had no cause of complaint. The jury was told over and over again that the presumption of law was that the defendant was innocent until his guilt was established by evidence; that he was entitled to the benefit of any and all reasonable doubts, and could not be convicted of any degree of crime unless the jury was fully convinced by the evidence in the case of his guilt, beyond and to the exclusion of all reasonable doubt. We see no grounds for saying that the jury was instructed to the prejudice of the defendant in regard to the character or degree of evidence necessary to warrant his conviction.

The other objection urged by counsel is answered by the case of *People v. Herbert*, 61 Cal. 544. Judgment affirmed.

We concur: McKEE, J.; MYRICK, J.; MCKINSTRY, J.; SHARPSTEIN, J.; THORNTON, J.; MORRISON, C. J.

65 Cal. 122

LOGAN v. SOLANO Co. (No. 9,134.)

Filed March 22, 1884.

An act entitled "An act to establish a uniform system of county and township governments," providing, among other things, for the compensation of county officers according to population, does not infringe the article of the constitution requiring every statute to embrace a single subject, and that subject to be expressed in the title.

The constitutional prohibition against local or special laws affecting the salary of any officer, does not render an act invalid which divides the counties of the state into 48 classes, according to population, and prescribes the salaries of the county offices within each class, though there are but 52 counties in the state.

In bank.

J. F. Wendell, for appellant.

A. J. Buckles, for respondent.

Ross, J. Among the provisions of the present constitution of this state are the following:

"The legislature shall establish a system of county governments which shall be uniform throughout the state; and by general laws shall provide for township organization, under which any county may organize whenever a majority of the qualified electors of such county, voting at a general election, shall so determine; and whenever a county shall adopt township organization, the assessment and collection of the revenue shall be made, and the business of such county and the local affairs of the several townships therein, shall be managed and transacted in the manner prescribed by such general laws." Article 11, § 4.

"The legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township, and municipal officers as public convenience may require, and shall prescribe their duties and fix their terms of office. It shall regulate the compensation of all such officers in proportion to duties, and for this purpose may classify the counties by population." Id. § 5.

It is also declared that the legislature shall not pass local or special laws "regulating county and township business, or the election of county and township officers," or "creating offices, or prescribing the powers and duties of officers in counties, cities, townships, election or school districts," or "affecting the fees or salary of any officer." Article 4, § 25.

In March, 1883, the legislature passed an act entitled "An act to establish a uniform system of county and township governments." St. 1883, p. 299. Among the provisions of the act is one classifying the counties by population for the purpose of regulating the compensation of the officers, and the compensation of the officers of the counties as thus classified is by the act fixed. The validity of the act is assailed on several grounds. In the first place, it is said to violate that provision of the constitution which provides that every act shall embrace but one subject, which subject shall be expressed in its title. As will have been noticed, the title is "An act to establish a uniform system of county and township governments." This title, we think, fairly expresses the subject of the act, and we are further of opinion that the act embraces but one subject. In another case under submission, in which the validity of this act is also in question, it is said in support of the point now under consideration that the body of the act treats of two subjects, because provision is therein made for county governments, and also for the division of such counties into townships, and for the election and compensation of justices of the peace and constables for such townships. But the creation of townships within a county, with the appropriate officers, like the division of the county into school, road, and supervisorial districts, with their appropriate officers, is but a part of the county government. This is an altogether different thing from the "township organization" spoken of in section 4 of article 11 of the constitution. A bare perusal of that provision makes this sufficiently plain, for it is there in terms declared that under the township organization that the legislature is

directed to provide for, any *county* may organize whenever a majority of the qualified electors of such county, voting at a general election, shall so determine; and, further, that whenever a county shall adopt such township organization, the assessment and collection of the revenue shall be made, and the business of such county, and the local affairs of the several townships therein, shall be managed and transacted in the manner prescribed by the general laws providing for the township organization. See, also, *Ex parte Wall*, 48 Cal. 318.

On the part of the appellant, it is contended further that those provisions of the act of March 14, 1883, relating to fees and salaries of officers, come within the inhibition of that provision of the constitution declaring that the legislature shall not pass local or special laws affecting the fees or salary of any officer. The provisions in question are a part of the general law establishing a uniform system of county and township governments. For the establishing and carrying on of such governments, officers are essential, and for such officers compensation must be provided. By the fifth section of article 11 of the constitution, the legislature is commanded to provide for the election or appointment in the several counties of all necessary officers, to prescribe their duties, fix their terms of office, and regulate their compensation. Certainly, there is no more appropriate place for such provision and regulation than in the act establishing the government of which the officers form part. The constitution further expressly provides that the compensation of all such officers shall be regulated in proportion to duties, and, for the purpose of so regulating the compensation, the legislature is authorized to classify the counties by population. The act in question, for the purpose of regulating the compensation of the various officers authorized by its provisions, establishes 48 classes, whereas there are in the state but 52 counties; and it is insisted that in establishing so many classes the legislature in some way violated that provision of the constitution authorizing the classification of counties in proportion to population. Counsel argues this proposition as if the constitutional provision was that the legislature should regulate the compensation of the officers of the various counties, townships, etc., in accordance with its classification by population. But this is not at all so. The requirement is that the compensation shall be regulated in proportion to duties, and as a means of doing that the legislature is authorized to classify the counties by population. How can the courts say how many classes it is necessary for the legislature to establish in order to carry out this command of the constitution? If they can say that 48 classes are too many, they can say that 38 or 28 are. The proper determination of that question of necessity depends upon a variety of considerations, which are for the legislature and not for the courts. The authority existing, it is not for us to say that it was improperly exercised. The legislature is a co-ordinate branch of the state govern-

ment, and the courts should never declare its acts invalid unless clearly in conflict with the constitution. We see no such conflict in this case.

Judgment affirmed.

We concur: MYRICK, J.; MCKINSTRY, J.; SHARPSTEIN, J.; MORRISON, C. J.

65 Cal. 121

PEOPLE v. WOODS. (No. 12,924.)

Filed March 22, 1884.

In an indictment for larceny, a description of the person from whom the property is alleged to have been stolen, is sufficient, if a name is given by which he is well known, even though his real name is different.

Department 1.

The Attorney General, for appellant.

Leander Quint, for respondent.

Ross, J. Defendant was indicted and tried for the larceny of \$105, the personal property of one Henry Williams. On the trial the person to whom the money was alleged to have belonged was examined as a witness, and testified, among other things, that his name was Henry Williams. In due course the defendant was convicted, and afterwards moved for a new trial, on the ground of newly-discovered evidence, the alleged newly-discovered evidence consisting in the fact that the owner of the stolen property was not Henry Williams, but was Henry Williams Brocken. In support of this motion the person spoken of as Henry Williams was permitted to testify in the court below that his true name was Henry Williams Brocken, and that he was so known by his friends and associates. He admitted, however, that he sometimes used the name Henry Williams in correspondence. And further: "I gave the name Henry Williams instead of Henry Williams Brocken, because I did not wish my own name to go into print." The court below granted defendant a new trial. In this there was error. The testimony on which the order was based, itself shows that the person from whom the money was stolen was sometimes known as Henry Williams, and so held himself out. There was no doubt as to his identity.

Order reversed.

We concur: MCKEE, J.; MCKINSTRY, J.

65 Cal. 345

BAYLY v. MUEHE.

Filed December 27, 1883.

In an action against an administrator or executor to foreclose a mortgage, the heirs of the deceased mortgagor are not necessary parties.

THORNTON, J., dissenting.

Appeal from superior court for city and county of San Francisco.

F. J. Castlehun, for appellant.

Stetson & Houghton, for respondent.

By THE COURT. For the reasons given in the opinion delivered when this case was before department 1 of this court,¹ the judgment is reversed, and cause remanded.

MYRICK, J., concurred, except so far as approval of *Cunningham v. Ashley*, 45 Cal. 485, may be applied.

THORNTON, J., *dissenting*. I dissent. It has been held in this state, at least since *Beckett v. Selover*, 7 Cal. 215, was decided, that under the system of law prevailing with us the real and personal estate of a person dying intestate vests in the heir, subject to the lien of the administrator for the payment of debts and expenses of administration. I know of no statute and no decision changing the rule as above stated, viz., that the title vests in the heir. Legislation subsequent to this decision may have changed the right of an administrator from a lien, though I am not prepared to say that the administrator's right

¹BAYLY v. MUEHE. (No. 8,165.)

Filed May 30, 1883.

Department 1.

Ross, J. One Baker owned a tract of land which he mortgaged to one Livermore, and then died intestate, leaving surviving him certain heirs at law. An administratrix of his estate was appointed, to whom the mortgage claim was presented, and the same was duly approved and allowed. Livermore then commenced suit against the administratrix to foreclose the mortgage. To that suit none of the heirs of the mortgagor were made parties. The proceedings in the action were regularly had and taken, and resulted in the entry of a decree of foreclosure in the usual form, the issuance of an order of sale, the sale of the mortgaged premises pursuant to its directions, and the execution of the sheriff's deed in due course of time. The question is, did the title to the property pass to the purchaser under the foreclosure proceedings? At the time of Baker's death the statute concerning descents and distribution provided that "when any person having title to any estate, not otherwise limited by marriage contract, shall die intestate as to such estate, it shall descend and be distributed *subject to the payment of his or her debts*" in the manner therein stated, and at the same time another provision of our probate system was, and since has been, as follows: "Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators, in all cases in which the same might have been maintained by or against their respective testators or intestates." If Baker had lived there can be no doubt that the action for the

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as to real estate is not now a lien coupled with a right of possession for the purposes of administration. I do not think the title to realty ever vests in the administrator under our system now, or ever did. In order to make a valid decree of foreclosure and sale, the parties holding the title to the estate mortgaged must be made parties to the action, or the decree is void against them. See *Goodenow v. Ewer*, 16 Cal. 461; *Boggs v. Hargrave*, Id. 559. This was held where the mortgagor, before the action for foreclosure was commenced, had conveyed the mortgaged premises to a third person. The purchaser not having been made a party, the decree was held invalid as to him, and subject to collateral attack. I can see no difference under our system between a person deriving title from the mortgagor by his own act or by operation of law. Nor can I see that the sections of the statute cited in the opinion of the majority affect the question. Because the title descends to the heir, subject to the payment of debts, certainly cannot change the rule. The title is still in the heir, and he has a right to be before the court to see that it is not improperly divested. The right to bring actions, given to the administrator by the statute, may co-exist with this right in the heir. It is not necessary for the administrator to have a title to the real or personal property in order to maintain actions under the statute for the recovery of real or personal property or for the possession thereof. It does not seem to me that to hold that the heirs are not necessary parties in such a case as the one under discussion, is to divest a person of his title without his being heard or having his day in court, and to deny him *due process of law*—a proceeding violative both of the state and federal constitutions.

foreclosure of the mortgage could have been maintained against him, and that a judicial sale and conveyance—the proceedings being regular—would have passed the title of the property to the purchaser. If, then, an action for the foreclosure of a mortgage is founded upon contract, the same result must follow, under our statute, when the action is brought against the executor or administrator of the testator or intestate; for it would not do to say that the statute authorizes the maintenance of such an action against the executor or administrator to the same extent as it might have been maintained against the testator or intestate, and yet to hold that a sale and conveyance made in pursuance of a decree duly rendered in such an action passed no title. The very purpose of a foreclosure suit under our system is to procure a legal determination of the existence of the lien, the ascertainment of its extent, and the subjection to sale of the property pledged for its payment. That such a lien arises out of contract is plain. The mortgage itself is a contract pledging the property embraced in it for the payment of the debt it is given to secure. The action of foreclosure is founded on this as well as the principal contract for the payment of the money, and the statute declaring that "all actions founded upon contracts may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates," we must hold that the executor or administrator, as the case may be, represents the title of their respective testators or intestates in such foreclosure suits, and that the statute has so far changed the common-law rule as to render it unnecessary to make the heirs parties. It has even been held in this state that a judgment in ejectment against the administrator concludes the heirs, although not parties to the action. *Cunningham v. Ashley*, 45 Cal. 485; *De Halpin v. Oxarart*, 58 Cal. 101.

Judgment reversed, and cause remanded.

SUPREME COURT OF CALIFORNIA.

65 Cal. 99

PEOPLE, etc., v. MEIGGS WHARF Co.

filed March 12, 1884.

The jurisdiction of the supreme court does not extend to an appeal from a judgment of the superior court affirming a judgment of the police court adjudging the defendant guilty of a misdemeanor, and imposing on it a fine as punishment.

In bank.

Appeal from the superior court of the city and county of San Francisco.

Doyle, Barber, Galpin & Scripture, for appellant.

The Attorney General, for respondent.

BY THE COURT. This is a motion to dismiss an appeal by defendant from a judgment of the superior court affirming a judgment of the police court adjudging the defendant guilty of a misdemeanor, and imposing a fine of \$50. The case is not "a criminal case prosecuted by indictment or information in a court of record." Const. art. 6, § 4. This court has no jurisdiction.

The appeal is dismissed.

65 Cal. 104

PEOPLE v. ROSS.

Filed March 14, 1884.

In a criminal case, after the testimony has closed and argument begun, it is in the discretion of the court to allow defendant to reopen his case for the purpose of introducing evidence on a plea of once in jeopardy, of which no evidence has been introduced, and refusal by the court is not ground for reversal.

Evidence of facts tending to connect defendant with the taking of the property named in the information is competent to prove larceny of said property by defendant.

Department 2.

Appeal from the superior court of Fresno county.

Rhodes & Merriam, for appellant.

The Attorney General, for respondent.

MYRICK, J. The information accused the defendant of the crime of grand larceny; and on being arraigned the defendant pleaded "not guilty," and "once in jeopardy." At the trial evidence was given for the prosecution and for the defense; but none of the evidence relates to the plea of once in jeopardy. After the district attorney had begun his opening argument to the jury, and was about to close, defendant's attorneys asked that they be allowed to reopen their case for the purpose of introducing testimony on the plea of once in jeopardy, and the request was denied. No error appears; it was a matter of discretion.

The evidence regarding the cigarettes was competent, for the reason that it tended to connect the defendant with the taking of the property named in the information; for this reason, doubtless, the court admitted it, notwithstanding the obscure manner in which the district attorney stated its object.

There is no error in the record.

Judgment affirmed.

We concur; THORNTON J.; SHARPSTEIN, J.

2 Cal. Unrep. 285

PEOPLE v. GRIDER.

Filed March 14, 1884.

In a prosecution for grand larceny, if the act of taking the property is admitted, but a felonious intent denied, the question of intent is one for the jury.

Department 2.

Appeal from the superior court of Sonoma county.

The defendant in this case was accused of the crime of grand larceny. Defendant pleaded not guilty. He admitted the taking of money from the pocket of one Carmody, but denied any intent to steal the same. Evidence as to this intent was introduced on both sides. The court ruled that the question of intent was one for the jury, and instructed them if they found a felonious intent, to render a verdict of guilty. The jury found defendant guilty, and from the above ruling and instruction defendant appealed.

Henley & Oates, for appellant.

The Attorney General, for respondent.

MYRICK, J. The information accused the defendant and one Donovan of the crime of grand larceny. That the defendant Grider took

the money from the pocket of Carmody, when the latter was intoxicated, is admitted. The proposition of Grider was that certain persons engaged in a "game" were endeavoring to obtain the money by means of the game, and that he (Grider) took it as a friend of Carmody to protect it for him. On the other hand, the theory of the prosecution seems to have been that Grider took the money feloniously, with intent to steal it, making use of the other idea as a pretext, or as an afterthought. In that view the ruling of the court and the instructions were correct.

No error appearing, the judgment and order are affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

65 Cal. 109

ELLIOTT, Adm'r, v. PATERSON, Judge, etc.

Filed March 21, 1884.

Where a judgment of nonsuit was entered after the death of plaintiff, *mandamus* is not the proper remedy to obtain the substitution of an administrator and retrial of the action. Such a judgment is not void on its face, and the administrator should procure the judgment to be set aside before making the application for *mandamus*.

Department 2.

Application for a writ of *mandamus*.

A judgment of nonsuit was rendered against a plaintiff after he had died, and before his death was brought to the attention of the court which tried the cause. The petitioner in this proceeding was duly appointed administrator of said plaintiff, and as such suggested his death, asked that he be substituted as plaintiff, and that the case be tried again. This motion was denied. Petitioner applied for *mandamus* to compel such substitution and retrial.

Byers & Elliot, for petitioner.

R. B. Hall, for respondent.

BY THE COURT. Application for a writ of *mandamus*. We are of the opinion that the writ should not issue, so long as the judgment stands; the judgment is not void on its face. The petitioner should procure the judgment to be set aside before making his application for *mandamus*.

Writ denied.

2 Cal. Unrep. 288

WIDEMAN *v.* FRANKS.

Filed March 21, 1884.

Evidence *held* sufficient to justify a finding that plaintiff's title was derived under a fraudulent sale, and void as to creditors.

Department 2.

Appeal from the superior court of Monterey county.

This was an action by plaintiff to recover the value of certain sheep, of which he claimed to be the owner through purchase from one Alvarado. The defendant, as sheriff, justified under an execution against said sheep as the property of said Alvarado. Evidence was offered to show that the transfer from Alvarado to plaintiff was fraudulent. The court found the transfer to be fraudulent, and rendered judgment in favor of the defendant. Plaintiff appealed.

A. S. Kittredge, for appellant.

D. M. Delmas, for respondent.

BY THE COURT. We think the evidence is sufficient to justify the finding that the transaction between Alvarado and plaintiff was fraudulent and void as to the creditors of the former.

Judgment and order affirmed.

2 Cal. Unrep. 289

HACKLEY *v.* CRAIG.

Filed March 21, 1884.

The supreme court has no jurisdiction over an appeal from a judgment of the superior court affirming a judgment in the justice's court for a sum within its jurisdiction.

Department 2.

This was an action originally commenced in the justice's court of the city and county of San Francisco. Judgment was rendered for the plaintiff for the sum of \$180, with interest and costs. Defendant appealed to the superior court, and this judgment was there affirmed. An appeal is taken from this judgment of the superior court.

J. H. Meredith, for appellant

York & Whitworth, for respondent.

BY THE COURT. This court has no jurisdiction of this appeal. Appeal dismissed.

65 Cal. 106

BODE and others v. HOLTZ.

Filed March 17, 1884

Where persons having in their possession personal property liable to taxation, refuse, after demand properly made, to disclose the names of the owners or furnish a description of the property as required by law, the assessor is authorized and required to note such refusal on the assessment book and to make an estimate of the value of the property.

In bank.

Appeal from the superior court of the city and county of San Francisco.

This was an application for an injunction. Plaintiffs were warehousemen, and as such had on storage property of various merchants in the city of San Francisco. They rendered a statement of their property as required by law to said defendant, as assessor, but refused to disclose the names of owners of property in said warehouse, or to furnish a description of such property. Thereupon said assessor declared that he would voluntarily assess said property. Plaintiff then brought this action to restrain said assessor from such action. Defendants demurred to plaintiffs' complaint as not stating a cause of action. Plaintiff appealed from the order sustaining said demurrer.

J. H. Dickenson, for appellants.

William Craig, for respondent.

BY THE COURT. The complaint shows upon its face that the plaintiffs, at 12 o'clock m., on the first Monday in March, 1883, had in their possession *some* personal property belonging to citizens of the city and county of San Francisco which was subject to taxation, and that after demand made upon them by the assessor of that city and county, they refused to disclose the names of the owners or the description of the property. The law made it the duty of the plaintiffs to furnish the assessor with a statement of the property in their possession. Pol. Code, § 3629. Failing in that regard, the assessor

was authorized and required by section 3633 of the same Code to note such refusal on the assessment book and to make an estimate of the value of the property.

Judgment affirmed.

2 Cal. Unrep. 286

HAWES *v.* GREEN.

Filed March 17, 1884.

Where there is a failure to find on a material issue, judgment will be reversed.

Department 2.

Appeal from the superior court of San Mateo county.

J. C. Bates, for appellant.

Winans, Belknap & Godoy, for respondent.

By THE COURT. The defendant, sheriff, in his answer justified the taking of the property in controversy by virtue of an attachment issued against the property of plaintiff's vendor. There is no finding on the issue raised by the answer as to the averments in justification; the findings are silent upon this subject.

Judgment and order reversed.

SUPREME COURT OF CALIFORNIA.

65 Cal. 129

PEOPLE v. BUSH. (No. 10,895.)

Filed March 29, 1894.

Where, on a trial for murder, the prosecution sought to impeach a witness by testimony on matters immaterial to the issue, and without a proper foundation being laid for the impeachment by calling attention to the surrounding circumstances, and, an objection being made thereto, the trial court overruled the objection and admitted the evidence, *held*, that the objection should have been sustained and the evidence excluded.

Until the character of a witness has been attacked by evidence that his reputation for truth, honesty, and integrity is bad, evidence in proof of his good character is inadmissible.

The instruction that "when parties, by mutual understanding, engage in a conflict with deadly weapons, and death ensues to either, the slayer is guilty of murder," is correct and proper, if the circumstances be not such as to bring the case within the statute concerning dueling.

Where the court instructed the jury as follows: "If a sufficient time elapses, between a quarrel and the agreement to fight, to allow the blood to cool, the killing will be murder;" and "if, between the quarrel and the mortal stroke given, the prisoner takes up any other design or business not connected with the immediate object of his passion, or subservient thereto, it may be reasonably supposed that his attention was once called off from the subject of the provocation, and any subsequent killing of his adversary, without other provocation, and with a deadly weapon, would be murder,"—*held*, that such instruction was proper, and was not a charge to the jury on matters of fact.

An instruction that "if a defendant himself brought on the fight, and went into it armed, he cannot justify killing his adversary," is erroneous. If he, in good faith, endeavors to decline any further struggle before the act of homicide is committed, he may, although he was the assailant, justify the killing.

It is no answer to the objection that an erroneous instruction was given for the prosecution, to show that, in another part of the charge, another instruction was given in which the law was correctly stated by the court. It would be impossible, in such case, to determine under which instruction the jury acted.

In bank.

Appeal from the superior court of Los Angeles county.

G. Montgomery, Levi Chase, W. J. Gartwood, and T. J. Arnold, for appellant.

The Attorney General, for respondent.

MORRISON, C. J. The defendant was convicted of the crime of murder, and, having appealed to this court, presents several grounds of error, which he claims were committed by the court below.

1. On the trial of the case one Maud Parsons was called as a witness on behalf of the defense, and on her cross-examination was asked the following questions: "Question. Did you know of Mr. Bush's go-

ing to shoot Mr. Ivy (the deceased) before this time,—before the shooting took place? *Answer.* No, sir. *Q.* Did you, about a week before that time, tell Lou. Yancey that your uncle Jay was going to kill John Ivy? *A.* No, sir. *Q.* You never told anybody that? *A.* No, sir. *Q.* You never told her that? *A.* No, sir. *Q.* Do you remember coming down at noon about a week before the killing, when your uncle and John Ivy were in the street, and when they were quarreling? *A.* No, sir. *Q.* Did you at that time, or at any time, tell her that your uncle Jay was going to kill him? *A.* No, sir. *Q.* Your uncle never told you that? *A.* No, sir. *Q.* Did your uncle Jay ever tell you, at any time, he was going to kill John Ivy? *A.* No, sir.” At a later stage of the trial the following proceedings were had: “*Lou. Yancey* was called as a witness on behalf of the prosecution, and was examined as follows: *Q.* What is your name? *A.* Lou. Yancey. *Q.* Where do you live? *A.* In Julian. *Q.* Do you know Maud Parsons? *A.* Yes; I am well acquainted with her. *Q.* Do you remember the time John Ivy was killed? *A.* Yes, sir. *Q.* State if, at any time within a week previous to that, she said anything about her uncle going to kill John Ivy.” Objection was made to this inquiry on the two-fold ground that the matter upon which it was sought to impeach the witness was immaterial to the issues involved in the case, and also that the proper foundation had not been laid for the impeachment of the witness, as her attention had not been called to the surrounding circumstances, as required by section 2052, Code Civil Proc. It was also claimed that it was not cross-examination. Objections overruled by the court, exception taken, and the examination proceeded. “*Q.* State what she said to you. *A.* A week before the time he killed him we went down town, and in the street we saw Mr. Bush and Mr. Ivy, and they seemed to be kind of hectoring or quarreling about something. We went back to the school-house. I asked her what the quarrel was about. ‘Never mind,’ she said, ‘John Ivy will be sorry for all this.’ I said, ‘Why?’ She said, ‘Because my uncle Jay says he always kept his word, and does what he says. He says he will kill John Ivy. He told me this morning he was going to kill John.’ I said, ‘Does he say that?’ ‘Yes,’ she said; ‘he always keeps his word.’”

The ruling of the trial court in admitting the foregoing evidence, notwithstanding the objections of defendant's counsel, is the first ground of error relied upon on this appeal. We think the objection should have been sustained and the evidence excluded.

2. The second assignment is that the court erred in admitting evidence on the part of the prosecution, in support of the character of the witness Valentine, “*whose character*” (it is claimed) “*had not been in any manner attacked by the defense.*” By section 2053 of the Code of Civil Procedure it is provided that “evidence of the good character of a party is not admissible in a civil action, *nor of a witness in any action*, until the character of such party or witness has been impeached, or unless the issue involves his character.” See, also, sec

tions 2051 and 2052 of the same Code. The character of the witness was not impeached in such a manner as to authorize the introduction of evidence on the part of the prosecution to sustain it. It is only in cases where the witness' character is attacked by evidence that his reputation for truth, honesty, and integrity is bad, that evidence on the other side is admissible.

3. The court gave the following instruction to the jury:

"When parties by mutual understanding engage in a conflict with deadly weapons, and death ensues to either, the slayer is guilty of murder."

The court proceeds:

"If a sufficient time elapses, between a quarrel and the agreement to fight, to allow the blood to cool, the killing will be murder. The law assigns no limit within which cooling time may take place. Every case must depend on its own circumstances, but the time in which an ordinary man in like circumstances would have cooled may be said to be the reasonable time. *If, between the quarrel and the mortal stroke given, the prisoner takes up any other design or business not connected with the immediate object of his passion, or subservient thereto, it may be reasonably supposed that his attention was once called off from the subject of the provocation, and any subsequent killing of his adversary, without other provocation and with a deadly weapon, would be murder.*"

It is claimed, on behalf of the defense, that the foregoing instruction is erroneous, for two reasons: *First*, that an encounter and killing, under such circumstances, comes within the statute of dueling; that the act is therefore punishable under that statute, and therefore does not constitute murder; and, *secondly*, that the instruction charges the jury upon matters of fact.

Independent of the statute concerning dueling, it has been held that "when parties by mutual understanding engage in a conflict with deadly weapons and death ensues to either, the slayer is guilty of murder," and we do not think there is anything in the circumstances attending the killing in this case to take it out of the general rule. *State v. Underwood*, 37 Mo. 225; 1 Bish. Crim. Law, § 870; *Chalmer's Case*, 2 Va. Cas. 76. We are therefore of the opinion that the first objection to the charge cannot be sustained.

In the next place it is claimed that the court invaded the province of the jury by charging them upon a matter of fact:

"If between the quarrel and the killing there is a space or interval of time sufficient for an ordinary man to cool, that may be deemed a *reasonable time* within the meaning of the rule on the subject. And if between the quarrel and the infliction of the mortal wound the mind of the defendant is directed to and is taken up by any other subject not in any manner connected with the cause of the quarrel, it may be reasonably supposed that his attention was called off from the subject of the provocation, and any subsequent killing of his adversary without other provocation and with a deadly weapon would be murder."

The instruction seems to have been copied by the learned judge from the case of *Com. v. Green*, 1 Ashm. 289, as the language is almost identical in the two cases. To the same effect is the rule laid

down by Mr. Wharton in his work on American Criminal Law, 181, 182. See, also, *State v. McCants*, 1 Speers, (S. C.) 387; *Regina v. Fisher*, 8 Car. & P. 182; *State v. Sizemore*, 7 Jones, Law, 206. On the authority of the foregoing cases the instruction complained of seems to be correct, and is not obnoxious to the second objection made by the defense. Another, and the last point made by the appellant, is upon the following portion of the charge: "If the defendant himself brought on the fight, and went into it armed, he cannot justify killing his adversary." We think the foregoing is not a correct statement of the law concerning justifiable homicide. By section 197 of the Penal Code it is declared that homicide is justifiable in certain cases, the third subdivision of the section reading as follows:

"When committed in the lawful defense of such person, or a wife, husband,
* * * but such person, or the person in whose behalf the defense was made, if he was the assailant, or engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed."

The charge entirely overlooks the above provision of the Penal Code, and was therefore erroneous. It is not true that a party cannot justify killing another simply because he is the assailant. If he, in good faith, endeavors to decline any further struggle before the act of homicide is committed, he may, although he was the assailant, justify the killing. In the case of the *People v. Simons*, 60 Cal. 72, this court held that "even if the defendant had been the assailant, if he had really and in good faith endeavored to decline any further struggle before the homicide was committed, the killing might be justified in self-defense." Other cases might be cited to the same effect; and it is no answer to the objection that an erroneous instruction was given, for the prosecution to show that in another part of the charge another instruction was given in which the law was correctly stated by the court. In such a case it would be impossible to determine under which of the two contradictory instructions the jury acted. As was said by this court in the case of *People v. Wong Ah Ngow*, 54 Cal. 151, "an erroneous instruction is not cured by a correct statement of the law in another part of the charge." See, also, *People v. Campbell*, 30 Cal. 312.

We think there was evidence tending to bring the defendant's case within the section of the Code last referred to; and whether he was the aggressor, and if so he did in good faith try to avoid any further difficulty with the deceased before the homicide was committed, should have been left to the jury, by a proper instruction on the law applicable to the case. For this erroneous instruction, and the admission of improper evidence, the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

We concur: McKEE, J.; THORNTON, J.; MCKINSTRY, J.
v.3,no.8—38

ROSS, J. I concur in the judgment upon the ground last considered in the opinion.

SHARPSTEIN, J. I concur in the judgment. Evidence of the good character of a witness is not admissible until his character has been impeached. Code Civil Proc. 2053. This doubtless refers to impeachment "by evidence that his general reputation for truth, honesty, and integrity is bad." Id. 2051. When witnesses contradict each other, the character of the one is as much impeached as that of the other; and there would be as good ground for admitting evidence of the good character of the one as of the other. And where a witness is impeached by evidence of his having previously made statements inconsistent with his testimony, it amounts to nothing beyond contradictory evidence. He must be asked if he made such statements, and if he answers that he *did not*, evidence that he did is admissible; if he answers that he *did*, that is the end of the matter.

I think the instructions referred to in the principal opinion were erroneous. On other points I express no opinion.

2 Cal. Unrep. 289

KEATING *v.* EDGAR, Auditor, etc. (No. 9,260.)

Filed March 29, 1884.

Findings *held* to support the judgment.

In bank.

Appeal from the superior court of the city and county of San Francisco.

The facts are stated in the dissenting opinion of THORNTON, J.

William Craig, for appellant.

Scrivner & McKinne, Talcott & Crockett, and Robt. Crockett, for respondent.

BY THE COURT. The only question presented by the record on this appeal is whether the findings support the judgment. We think they do.

Judgment affirmed.

We dissent: MCKINSTRY, J.; ROSS, J.

THORNTON, J. I dissent. This is an application for a writ of mandate to be directed to William M. Edgar, auditor of the city and

county of San Francisco, commanding him to audit a claim of the petitioner, Keating. The proceeding was instituted in the superior court for the city and county of San Francisco, where judgment was rendered for the applicant, from which the defendant appeals.

The case is substantially as follows:

The applicant was awarded a contract, as the lowest bidder, for certain work to be done on the new city hall. The applicant entered into a contract; performed the work according to such contract. The lines, levels, and heights, referred to in the contract were furnished him after considerable delay by one Clifford, then the architect of the new city hall, whose duty it was to furnish them. At or about the time that the applicant had finished the work aforesaid, "in accordance with the lines, levels, and heights as aforesaid, furnished by said architect Clifford, the said Clifford was discharged for incompetency from his position and place as such architect," and he thereupon ceased to act. Thereafter, one Hatherton was duly appointed architect for the new city hall in the place of Clifford, and entered on the duties of his office. "That said Hatherton, after assuming the duties of his position as such architect, and after he had so entered into the said office or place, discovered and ascertained that the lines, levels, and heights so furnished to the petitioner as said contractor by said Clifford, as aforesaid, were erroneous, and that the work done and performed by petitioner according to the lines, levels, and heights, so as aforesaid furnished by said architect Clifford, would not answer the purpose or purposes for which the same was intended or designed, and was not in accordance with the work called for under said contract and the specifications thereto attached, and thereupon the architect Hatherton furnished to said petitioner, as such contractor, new lines, levels, and heights, and required your petitioner, as such contractor, to remodel and move the said foundations, and replace them in accordance with the lines, levels, and heights so furnished by said Hatherton; that by the terms of the said contract it is provided that any and all work so performed by said contractor shall be done and completed in a proper and workmanlike manner, and to the satisfaction of the architect and the superintendent; that said architect was dissatisfied with and refused to approve the work so done and completed by said petitioner, in accordance with the lines, levels, and heights so furnished by the said Clifford, until he had completed the work specified in said contract by the lines, levels, and heights so furnished by the said Hatherton; that said contractor did remodel said work and foundations in accordance with the instructions and command, and to the satisfaction of said Hatherton, at a great additional expense to himself; that the work and labor performed by relator, under the instructions of said architect Clifford, was well and faithfully done, and any and all imperfections in said work was wholly due to and caused by the mistake or incompetency of said architect Clifford; that when the work and labor so to be done and performed by petitioner, as such contractor, had been carefully, well, and skillfully done, in accordance with the lines, levels, and heights so as aforesaid furnished by said Hatherton, relator was paid only the original amount provided in said written contract to be paid." Afterwards, the applicant presented to the board of new city hall commissioners his demand for \$950, (which demand is the one herein sought to be audited,) "for damages actually suffered by him by reason of the above-mentioned facts, which said demand was, by a majority of the board, allowed and ordered to be paid." The defendant refused to audit the demand.

The facts above stated are so found by the court. We are of opinion that the court below erred in rendering judgment for the petitioner.

It was provided by the contract that the lines, levels, and heights were to be furnished by the architect, and that the contractor must observe them. The contract binds the contractor "to set out the lines and levels for all the works, and must be responsible for the correctness of such setting out." These lines, levels, and heights were furnished by the architect; the work was done by Keating in accordance with them, and with the terms of his contract. It was the duty of the architect, when the work was so done, to have approved it, and to have granted his certificate. Nevertheless, the succeeding architect refused to approve the work and grant his certificate until the work was done according to the lines, levels, and heights furnished by him.

When the architect Hatherton refused to do what, under the facts found, it was his bounden duty to do,—that is, approve the work and grant his certificate to the applicant, that such applicant might get his pay,—the only course left open for the applicant was to take steps to compel him to do so. This he might have done, under the facts of the case, by an application to the proper judicial tribunal to compel the architect to do what the law made it his duty to do. Having failed to do this, and yielding to the demands of the architect that he should remodel the work, which he did at great expense, does not and cannot enlarge his rights. The architect had no right under the law to impose any such terms on a contractor who had done all that his contract required him to do. Such demands were unjust, illegal, and arbitrary on the part of the architect, and the law did not require a submission to them by the applicant. When the work was completed the board of commissioners could only allow to him what it did allow, viz., the original amount provided in the written contract to be paid. This, it is found, was paid him, and under the contract and the facts found this was all the law allowed him, and all the law justified the board in allowing him. The statute is explicit in its requisition: "Nor shall a contractor be allowed a claim for work done or material furnished not embraced in his contract." St. 1875-76, § 14, (Act of March 24, 1876, p. 465.) If the board had allowed a sum greater than that agreed by the contracting parties to be paid when the work was performed, such action would have been unauthorized, in conflict with the provisions of the statute just above cited, and an inexcusable dereliction of duty on the part of its members. If, after the completion of the contract in accordance with the directions of the architect Clifford, it became necessary for any reason to remodel the work, or have it altered in any respect, it should have been let to the lowest bidder, by the board, under call for bids, in accordance with the requirements of the statute which invested the board with all the powers they had. See section 14 of statute above cited. The board could not have work done without a contract regularly awarded and entered into, and after it was done allow its value. This was substantially forbidden by the statute. We see

nothing in the statute, under which the board of commissioners acted, which authorized them to allow any claim for damages, whether for delay on the part of the architect or on any other ground. We have examined the statute, and can find no such power vested in the board by the act. See Act of March 24, 1876, (St. 1875-76, p. 461.) Further, the consequences of such delay is provided for in the contract. It is stipulated therein that if the work of the contractor is delayed by the action of the architect and other causes specified, the contractor should be entitled to an extension of time for the performance of his work proportionate to the delay so caused. It is true that by section 10 the board is authorized to allow claims, but manifestly the claims here alluded to are those which the board is called to pass on for work done or materials furnished under contracts awarded and entered into under the provisions of the law from which such board derived its being and its powers. The board had no power to make this allowance to Keating, and such allowance was null. Therefore the defendant acted properly in refusing to audit such claim, and the application of the petitioner Keating should be denied.

(65 Cal. 133)

PEOPLE v. MAJORS. (No. 10,929.)

Filed April 1, 1884.

The murder of two persons constitutes two separate crimes, for each of which a defendant is liable to a separate prosecution and trial, though the killing be by the same act, and a conviction or acquittal in one case does not bar a prosecution in the other on the plea of once in jeopardy.

On a motion by defendant in a criminal action for a change of venue, the court may permit the introduction of counter-affidavits for the purpose of contesting the grounds on which the removal is prayed.

Although a defendant be already under sentence of life imprisonment for another crime, it is within the jurisdiction of the court to try him for murder.

No appeal lies from an order denying a defendant, in a criminal action, a new trial on a plea of former conviction, and the court may proceed to try the defendant on the charge of murder, though an appeal has been taken on that ground and is still pending.

Murder is not necessarily punishable by death, but as death may be the punishment, under the provision of the statute, any person "entertaining such conscientious opinions as would preclude his finding the defendant guilty, must neither be permitted nor compelled to serve as a juror."

Where the prosecution declined to exercise the right of peremptory challenge and passed the jury, and the defendant then peremptorily challenged a juror, the action of the court in then permitting the prosecution to peremptorily challenge a juror, against the objection of the defense, does not call for a reversal of the judgment, being a mere irregularity at most, which did not affect any substantial right of the defendant.

In a prosecution for murder the surrounding circumstances may always be shown as part of the *res gestæ*, and, as such, the condition in which the body and clothing were found was properly admitted in evidence.

All matters talked of in conversations between parties conspiring to commit a crime are admissible if spoken of at the time the main subject of the conspiracy

was talked of. But, independent of this, if this matter was stricken out, and the jury instructed not to consider it, this, of itself, would be sufficient to cure any error made by the admission of it.

In bank.

Appeal from the superior court of Santa Clara county, on the plea of former conviction, and from the superior court of Alameda county, on a verdict of murder in the first degree.

J. B. Lamar, for appellant.

The Attorney General and J. H. Campbell, for respondent.

MORRISON, C. J. The defendant was prosecuted, by information filed in the superior court of Santa Clara county, for the murder of one Archibald McIntyre, and a change of venue having been granted him to the county of Alameda, he was tried and convicted there of the crime of murder in the first degree. The appeal is from the judgment against him in the first-named court on the plea of former conviction, as well as from the judgment on the final trial in the county of Alameda, and brings before us for review all the orders and proceedings in the case in both courts. The importance of the case, as well as the zealous and able manner in which it has been presented, demand from us a careful consideration of all the questions involved. The first and most important point to be considered is the plea of a former conviction, and for a full and distinct understanding of the trial on that plea we will consider the facts upon which it was submitted to the jury, as the same are found in the following stipulation:

"STATEMENT OF FACTS.

"(1) That the defendant, Lloyd L. Majors, is the identical Lloyd L. Majors who was a defendant in the information filed in this court on the thirtieth day of March, 1883, charging Joseph Jewell, John Showers, and Lloyd L. Majors with the crime of murder in the killing of one William P. Renowden at the said county of Santa Clara on the eleventh day of March, 1883.

"(2) That under said information of March 30, 1883, said Lloyd L. Majors was duly arraigned, and on the second day of April, 1883, plead 'not guilty,' and was put upon his trial; that on the twenty-seventh day of May, 1883, the jury returned into said court a verdict in the following words, etc.: 'The Superior Court, County of Santa Clara. *The People of the State of California versus Lloyd L. Majors, Defendant.* We, the jury in the above-entitled cause, find the defendant, Lloyd L. Majors, guilty of murder in the first degree, with imprisonment for life in the state prison. JOHN CARRICK, Foreman.'

"(3) That, in pursuance of the above verdict, the court, on the second day of June, 1883, pronounced upon said Lloyd L. Majors judgment of imprisonment for life in the state prison at San Quentin, and said judgment is final and in full force.

"(4) The facts shown by the evidence upon the said trial under said information of March 30, 1883, and upon which said Majors was convicted, as aforesaid, are as follows: That said Lloyd L. Majors counseled and advised

one Joseph Jewell to rob one William P. Renowden, living near Lexington, in the said county of Santa Clara, on the eleventh day of March, 1883; that on said day said Jewell repaired to said Renowden's house, taking with him one John Showers; that said Jewell and Showers unexpectedly found at the house of said Renowden one Archibald McIntyre, who was then residing with said Renowden; that in the attempt to carry out the design of robbery, both said Renowden and said McIntyre were there and then, at the same point of time, to-wit, about 6:30 o'clock P. M. of the eleventh day of March, 1883, killed by said Jewell and Showers.

"(5) Said Majors was not present, neither did he personally participate in the said act of killing said Renowden and McIntyre, or either of them, except counseling and advising said Jewell to commit said robbery as aforesaid.

"(6) The foregoing evidence and facts are substantially the evidence and facts adduced upon the trial of said Lloyd L. Majors upon the trial heretofore had in this court, upon said information, for the murder of William P. Renowden, and which are to be adduced and proven in support of the information now pending, to which the said Lloyd L. Majors has pleaded a former conviction, should the same be put in issue by a plea of not guilty.

"(7) It is stipulated and agreed by the plaintiffs and the defendant as follows: The foregoing statement of evidence and facts are hereby admitted to be true, solely for the purpose of determining the issue now pending in this court on the plea of former conviction, and shall be read in evidence on the trial of said issue as the evidence of the case, together with the record of the case of the people against Lloyd L. Majors for the murder of William P. Renowden, heretofore tried in this court, consisting of the judgment roll and the minutes of the court in said cause."

The defendant was first prosecuted for and convicted of the murder of said Renowden, and as it is stipulated in the agreed statement of facts on which he was tried in the present case, on his plea of former conviction, that Renowden and McIntyre were "at the same point of time, to-wit, about 6:30 o'clock P. M. of the eleventh of March, 1883, killed by said Jewell and Showers," it is therefore claimed that defendant has been *once in jeopardy*, and cannot now be prosecuted for the murder of McIntyre. In support of this ground of defense defendant relies upon numerous adjudged cases, and it must be conceded that the general principle is too well established to admit of controversy, that the law will not allow the people to maintain a second prosecution after a former trial and conviction or acquittal of a party *for the same offense*. The cases most strongly relied upon, on the part of the defense, we will now proceed to examine:

The first is the case of *State v. Damon*, 2 Tyler, (Vt.) 387, in which it appeared that the defendant had, in the same affray and by the same stroke, cut two persons, and, having been convicted of wounding one of the parties, it was held that the plea of *autrefois acquit* was well pleaded to an indictment for wounding the other. In delivering the opinion of the court the learned judge says:

"The indictment charges the defendant with having disturbed the public peace by assaulting and wounding one of its citizens. For this crime he shows that he has been legally convicted by a court of competent jurisdiction. He cannot, therefore, be again held to answer in this court for the same offense."

On the theory that both indictments were for "the same breach of the peace," and not for wounding two persons by the same wrongful act, the case may be harmonized with authorities which will be hereafter referred to in this opinion.

Another case relied on is that of *State v. Cooper*, 13 N. J. Law, 361. The defendant was indicted for the crime of murder, committed in feloniously setting fire to and burning the dwelling-house of one Ralph Smith, in which was one Joseph Hooper, who was burned to death. To the indictment defendant interposed the plea of former conviction on an indictment for the crime of arson, committed in setting fire to and burning the same dwelling-house. The plea was sustained, and the court in its opinion says:

"It is a maxim of the common law that no man is to be brought in jeopardy of his life more than once for the same offense. * * * Upon this principle are founded the pleas of *autrefois acquit* and *autrefois convict*. The writers on the subject concur in stating that these pleas must be upon a prosecution for the same *identical* act and crime. 3 Bl. Comm. 336; 1 Chit. Crim. Law, 452, 462. But, says Chitty, (page 455,) 'it is not in all cases necessary that the two charges should be precisely the same in point of degree, for it is sufficient *if an acquittal of the one would show that the defendant could not have been guilty of the other.*' Thus a general acquittal of murder is a discharge upon an indictment for manslaughter on the same person, *because the latter charge was included in the former.* * * * At first view it appears as if there were two crimes distinctly indictable and punishable. But our sense of justice is shocked by the idea that a man shall be convicted and punished for the arson, with that measure of punishment which the laws mete out to those guilty of that crime, and that afterwards, for a perfectly accidental and involuntary killing, he shall be liable to the same punishment of death which is inflicted on the willful and malicious murderer. In the case before us the killing *was a simple consequence of the burning*, and there is no pretense that it was, in point of fact, intentional."

We have quoted from the opinion at some length to show how far it bears upon the case we are now considering.

A third case is that of *Clem v. State*, 42 Ind. 420, in which DOWNEY, J., delivering the opinion of the court, says:

"It does not follow because one of the indictments was for the murder of Nancy Jane Young and the other for the murder of Jacob Young, that the crime is not the same. If the same act of the defendant resulted in the death of both of them, there was but one crime. When by the discharge of a firearm, or a stroke of the same instrument, an injury is inflicted upon two or more persons, or their death is produced, there is but one crime committed."

This case is an authority in favor of the defendant, if, as his learned counsel contends, the stipulation means that the deaths of Renowden and McIntyre resulted from one and the same act,—a question which we will consider hereafter.

The cases of *Roberts v. State*, 14 Ga. 8, and *Holt v. State*, 38 Ga. 187, are also cited on behalf of the defendant, and it is there said that "the plea of *autrefois acquit* or *convict* is sufficient whenever the proof shows the second case to be the same *transaction* with the first." The question how far the authority of these cases agrees with other

kindred cases depends on what is meant by the word "transaction."

The foregoing review of the cases relied on in support of defendant's plea of former conviction will suffice for the purposes of this opinion, and we will now proceed to the examination of some of the cases cited by the prosecution:

It is claimed that the case in 52 Ind. has been overruled by the same court in the two later cases of *State v. Elder*, 65 Ind. 282, and *State v. Hattabough*, 66 Ind. 223. In the first case (reported in 65 Ind.) the rule on the subject we are now treating is stated as follows:

"When the same facts constitute two or more offenses, wherein the lesser offense is not necessarily included in the greater, and when the facts necessary to convict in the second prosecution would not necessarily have convicted in the first, then the first prosecution will not be a bar to the second, *although the offenses were both committed at the same time and by the same act.*"

And in the other case (66 Ind.) it is said:

"The usual test by which to determine whether the former conviction or acquittal was for the same offense as that charged in the second prosecution, and therefore whether the former is a bar to the latter, is to inquire whether the evidence necessary to sustain the latter would have justified a conviction in the former case."

Testing the case of *Clem v. State*, *supra*, by the rule laid down in the later cases referred to, (65 and 66 Ind.,) it would be difficult to sustain the authority of the former. Clem, being indicted and prosecuted for the murder of Nancy Young, could not, on such indictment and prosecution, have been convicted of the murder of another person, to-wit, Jacob Young, nor *vice versa*. Indeed, on an indictment for the murder of one of the Youngs, evidence on the part of the prosecution tending to prove the murder of the other, would have been wholly inadmissible on general rules of evidence.

We now come to cases on the other side more directly in point. The first case to which we will refer is that of *State v. Standijer*, 5 Port. (Ala.) 523, in which it appears that two persons, John W. F. Long and Lei A. Long were injured—one killed and the other wounded—by the defendant at the same time and in the same transaction. For the murder the defendant was tried and acquitted, and on the trial for the wounding he pleaded the acquittal in the murder case. The court held the plea bad, and stated the law as follows:

"Cases exist in which a minor offense may be discharged by the acquittal of the individual charged on an indictment for a major offense, but these are cases in which the jury trying the case could have lawfully returned a verdict for the lesser crime. Thus an acquittal for murder would be a bar to an indictment for manslaughter. So of a burglary, when the same indictment included a charge of larceny, an acquittal would be a complete bar. But the reason in such cases is that the jury could, if the evidence was satisfactory, have convicted the offender of the lesser criminal charge. In the present case no question can possibly arise as to the law. The offenses have no appearance of identity; they could not be included in the same indictment; and the evidence which would produce an acquittal of the one, might produce a conviction of the other."

The next case is that of *Teat v. State*, 53 Miss. 439, where it was held that "T. and S., lying in ambush together, each armed with a double-barreled shot-gun, two distinct but almost simultaneous shots were fired from the ambush, by which G. and W. were mortally wounded, and S. fired a third shot in the prostrate body of G.: held, that the murder of G. was a distinct crime from that of W., and that for each of the offenses T. might be separately tried; nor could he, on an indictment for the murder of W., successfully plead former jeopardy in having been already tried for the murder of G. A putting in jeopardy for one act is no bar to a prosecution for a separate and distinct act, merely because they are so closely connected in point of time that it is impossible to separate the evidence relating to them on the trial for one of them first had." The learned judge further says: "It is believed that no well-considered case can be found, where a putting in jeopardy for one act was held to bar a prosecution for another separate and distinct one, merely because they were so closely connected in point of time that it was impossible to separate the evidence relating to them."

In *Vaughan v. Com.* 2 Va. Cas. 273, it was held that "if a person be indicted for shooting S. W., and acquitted thereof, and then indicted for shooting J. W., her plea of *autrefois acquit* will not be supported, although the same act of shooting is charged in each indictment."

Bishop, in his work on Criminal Law, (vol. 1, § 1051,) speaking of the identity of offenses, says: "They are not the same—*First*, when the two indictments are so diverse as to preclude the same evidence from sustaining both; or, *secondly*, when the evidence offered on the first indictment, and that intended to be offered on the second, relate to different transactions, whatever be the words of the respective allegations; or, *thirdly*, when each indictment sets out an offense differing in all its elements from that in the other, though both relate to one transaction," etc.

In the case of *Freeland v. People*, 16 Ill. 380, it was held "that it was no bar to a prosecution for a riot that one of the accused had been tried and convicted and fined for an assault and battery arising out of the same transaction or offense, and occurring at the same time. A riot may embrace an assault and battery, yet a conviction of the latter cannot be pleaded in bar of a prosecution for the former." See, also, *Severin v. People*, 37 Ill. 414.

In the case of *Com. v. Roby*, 12 Pick. 496, the court says that "a conviction upon an indictment for an assault, with intent to commit murder, cannot be pleaded in bar to an indictment for murder." And, further, "unless the first of the two indictments was such as the prisoner might have been convicted upon, by proof of the facts contained in the second, an acquittal or conviction on the first can be no bar to the second."

In the case of *Burns v. People*, 1 Parker, Crim. Rep. (N. Y.) 182, the supreme court of New York holds that, "to constitute a bar the offense charged in both indictments must be identically the same, in law as well as in fact." To the same effect is the case of *People v. Saunders*, 4 Parker, Crim. Rep. 196, as is also the case of *Regina v. Morris*, 10 Cox, C. C. 480.

We might cite many other cases laying down the same principle, but we will content ourselves with the foregoing, and one other case from our own reports. We refer to the cases of *People v. Alibez*, 49 Cal. 452, where it was held that "an indictment which charges the defendant with the murder of three persons, charges three offenses." The charge was that the defendant administered a poisonous drug, to-wit, strychnine, to three persons at one and the same time, and the trial court was asked to arrest the judgment on the ground that the indictment charged more than one offense, in violation of section 954 of the Penal Code. The court refused to arrest the judgment, and the supreme court reversed the case. This is a direct authority on the point we have been considering, and we do not doubt its correctness.

On the trial of the defendant, Majors, for the murder of Renowden he could not have been convicted of the murder of McIntyre. The two crimes, although committed at one time and by the same act, are entirely different in their elements, and the evidence required to convict in the one case very different from that essential to a conviction in the other.

Tested, then, by the rule laid down in the foregoing cases, the plea of former conviction was not sustained on the trial in the superior court of Santa Clara county.

But we do not think the stipulation means that both Renowden and McIntyre were murdered by one and the same act. It might well be that they were both killed at the same point of time, and it does not follow therefrom that the murder of the two was accomplished by one act. There were two parties directly concerned in the murder, and each of them might have discharged his weapon at his victim at the same moment or point of time, and yet the killing, under such circumstances, would have been done by two acts entirely separate and distinct from each other. Under such a state of facts the authorities all agree that there may be several prosecutions, and the burden of proof was on the defendant to show that there was but one act which caused the death of the two. But even on this theory we have attempted to show that the better rule, and that established by the great weight of respectable authority, is that the murder of two persons, even by the same act, constitutes two offenses, for each of which a separate prosecution will lie, and that a conviction or acquittal in one case does not bar a prosecution in the other.

2. Defendant's second point is that the court erred in permitting the introduction of counter-affidavits, on defendant's motion, for a

change of the place of trial. Sections 1033 and 1034 of the Penal Code provide for the removal of a criminal action on the application of defendant, and section 1035 of the same Code declares that, "if the court is satisfied that the representation of the defendant is true, an order must be made for the removal of the action to the proper court of a county, free from a like objection." It is claimed, on behalf of the defense, that when a sufficient showing for such removal is made by the defendant's affidavit, the court is obliged to accept as true the facts sworn to by him, and the people cannot controvert his statements by opposing affidavits. The language of the Code is that, "if the court is *satisfied* that the representation of the defendant is true," it shall make the order of removal. It is not a fair implication, from the language of the provision, that counter-affidavits may be filed on behalf of the people, and is such not the good sense of the law in such cases? When the proper showing is made by the defendant, the court would be *obliged* to make the order of removal, if counter-affidavits were not allowed, but the court must be *satisfied* that the defendant's affidavit *speaks the truth*, and it may be that this can be shown only after the prosecution has been allowed to file counter-affidavits. Such seems to have been the view taken by this court in *People v. Yoakum*, 53 Cal. 570, and we have no doubt of its correctness.

3. On the motion of the prosecution for the court to fix a day for a trial of the case the defendant objected to the jurisdiction of the court on two grounds: *First*, that the defendant was under sentence of life imprisonment in the state prison; and, *secondly*, that an appeal had been taken and was still pending in the supreme court from the order of the superior court denying a new trial on the plea of former conviction. The first objection is answered by the decision of this court in the case of *People v. Hong Ah Duck*, 10 Pac. C. L. J. 149; and the second by the case of *People v. Majors*, *ante*, 401. It is unnecessary for us to do more than refer to these cases. The defendant had been once tried on his plea of former conviction, and it was not the duty of the court to grant him another trial on that plea. We see no irregularity in the proceedings of the court connected with this assignment of error.

4. The fourth ground of error relied upon relates to the impaneling of the jury. The prosecution was allowed to challenge jurors peremptorily under subdivision 8 of section 1074 of the Penal Code, which provides as follows: "If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty, in which case he must neither be *permitted* nor compelled to serve as a juror." It is claimed that inasmuch as the crime of murder is not *necessarily* punishable by death, therefore the above subdivision of section 1074 does not apply. We cannot yield our assent to this view of the law. Murder may be punished under the Code by death, but if jurors in the case entertain con-

scientious scruples against the infliction of the death penalty, the law inflicting that penalty would be a dead letter on the statute-book. It has always been held, so far as our experience or knowledge goes, that the provision of the Code referred to applies in all prosecutions for murder, and we have no doubt that it does.

5. The next objection involves another question concerning the right of peremptory challenges. It is said that the prosecution "passed the jurors, declining to exercise any challenge. The defendant, being then called upon to exercise his peremptory challenges, if any he had, then challenged one juror, and the prosecution then immediately demanded to challenge one of said jurors, and was allowed to do so, against the defendant's objection." This, it is claimed, was a violation of section 1088 of the Penal Code, which provides: "If all challenges (for cause) on both sides are disallowed either party, first the people and then the defendant may take a peremptory challenge, unless the parties' peremptory challenges are exhausted." In the case of *People v. McCarty*, 48 Cal. 557, it was held "that if the prosecution in a criminal case pass the jury to the defendant, who declines to make any challenge, the prosecution may then interpose a peremptory challenge to a juror before he is sworn." It is true, the foregoing case differs slightly from this, inasmuch as in that case the defendant did not interpose any challenge, whereas, as in this case, he did; but we do not think that the difference between the facts of the two cases in any manner affects the principle applicable to both. It is there said that the prosecution had not accepted the jury by only passing them to the other side. At most, the action of the court was an irregularity, not affecting, so far as we can see, any substantial right of the defendant, and one which does not call for a reversal of the judgment. Penal Code, § 1258; *People v. Sprague*, 53 Cal. 491.

6. The admission of certain evidence showing or tending to show that Renowden's person and clothing had been burned is the next matter complained of. We do not clearly perceive what objection could have been made to the admission of this evidence. The production of the bloody clothing worn at the time by the victim of a homicide is a matter of common practice, and certainly it would be permitted for the jury to view the remains of the deceased, as they are allowed under the express provision of the Code to view the premises where the homicide was committed. Sometimes bodies are exhumed for the purpose of procuring evidence against the accused. The condition in which the body and clothing were found were properly admitted in evidence. The surrounding circumstances may always be shown as a part of the *res gestæ*. 1 Greenl. Ev. § 108.

7. The conversations admitted in evidence between defendant and Jewell all occurred at one time and were properly admitted. At the time the main transaction was discussed, those other matters were spoken of. If they had not been talked about at the same time, and

in the course of the same conversation, they would have been inadmissible. But, independent of this, they were stricken out on motion of defendant's counsel, and the jury were instructed not to consider them. This was of itself sufficient to cure any error there might have been in their admission.

8. Defendant complains of the action of the court in giving and refusing certain instructions. We have examined the instructions given, and think they contain a correct exposition of the law applicable to the case. We have also examined the instructions refused, and think the action of the court in refusing them was correct.

We have now considered all the points in the case made by the learned counsel for the defense, and have endeavored to answer them.

No error is found in the case which calls for a reversal of the judgment below, and the same is therefore affirmed, together with the order denying a new trial.

We concur: MYRICK, J.; MCKEE, J.; ROSS, J.; THORNTON, J.; SHARPSTEIN, J.; MCKINSTRY, J.

65 Cal. 135

PEOPLE v. EHRLING. (No. 10,940.)

Filed April 1, 1884.

On a trial for robbery, the prosecution will not be allowed to give in evidence admissions and conversations by the prosecuting witness, made shortly after the commission of the crime, not under oath, and not in the presence of the defendant, in contradiction to the testimony of the prosecuting witness himself, under oath. Such admissions are no part of the *res gestæ*.

Department 2.

Appeal from the superior court of Stanislaus county.

J. L. Maddox, B. C. Minor, and George A. Whitby, for appellant.

The Attorney General, for respondent.

SHARPSTEIN, J. The court erred in admitting evidence of a statement made by Pinkston, the person alleged to have been robbed by the defendant, to the witness Dallas. The statement was not made in the presence of the defendant, and there is nothing in the record which shows that it was anything more than a mere narrative of a past occurrence. It was an isolated conversation held between Pinkston and the witness, sometime after the events narrated had transpired; but how long after does not appear. Pinkston, when on the witness-stand, did not attempt to state when, where, or by whom

the alleged robbery was committed. He testified that he had a watch at 11 A. M., and between 1 and 2 P. M. he missed it. He thought that he had been knocked down, and that the watch had been taken from him without his consent. But of that he was not positive. This was what he stated *when under oath*. The prosecution was permitted to prove that, *when not under oath*, he had *positively* stated he had been "knocked down and robbed." It does not appear that he then stated what he had been robbed of, or who had knocked him down and robbed him. This illustrates very clearly the objection to the admission of such evidence. Judges and law-writers have differed as to when statements must be made in order to be admissible in evidence as part of the *res gestæ*. But, so far as we are advised, there is no reported case in which such evidence has ever been admitted under circumstances at all similar to those under which it was admitted in this case.

Judgment and order reversed.

We concur: THORNTON, J.; MYRICK, J.

65 Cal. 136

PEOPLE v. ROBINSON. (No. 10,913.)

Filed April 1, 1884.

Where, in a criminal action, the clerk, under the instruction of the court, handed to the jury, as they were leaving the court-room to consider the case, three forms of verdict corresponding to those which the court instructed them they might bring in, and they returned one of them as their verdict, *held*, that this did not constitute either error or irregularity.

Department 2.

Appeal from the superior court of the city and county of San Francisco.

John D. Whaley, for appellant.

The Attorney General, for respondent.

SHARPSTEIN, J. The court did not, as appellant's counsel claims, "charge the jury that under the information their verdict *must* be either guilty of robbery, guilty of grand larceny, or not guilty;" but did charge them that they *might* find a verdict of guilty of either of the offenses above specified, or might find a verdict of acquittal, as they deemed proper. The jury were not told that they could not find any other verdict, and the court was not requested to charge them that they could. It appears that when the jury were leaving the

court-room on their way to the jury-room the clerk handed them three forms of verdict corresponding to those mentioned, and that they returned one of them as their verdict; that is, they found the defendant guilty of robbery, the highest crime of which they could find him guilty under the information. This does not, in our opinion, constitute an error or even an irregularity.

Judgment and order affirmed.

We concur: THORNTON, J.; MYRICK, J.

2 Cal. Unrep. 293

COLLINS v. FROST and others. (No. 7,653.)

Filed April 1, 1884.

Evidence held to support the findings.

Department 2.

Appeal from the superior court of Santa Clara county.

This was an action for damages for conversion of certain barley. One of defendants, as sheriff, justified under an execution duly issued. The other defendant claimed said property under the same execution, issued against said barley, as the property of one Murphy. Evidence was duly introduced of the facts, and the court found said execution illegal, said barley being the property of plaintiff and not of said Murphy, and thereon rendered judgment for plaintiff. Defendants appealed.

C. C. Stephens and *R. B. Moyes*, for appellant.

W. H. Collins, for respondent.

By THE COURT. The findings are supported by the evidence; no error appears in the record. It appearing to us that the appeal was taken for delay, the judgment and order are affirmed, with \$75 damages.

SUPREME COURT OF CALIFORNIA.

2 Cal. Unrep. 294

PEOPLE v. CARTY.

Filed April 3, 1884.

Newly-discovered evidence is a ground for a new trial.

Department 2. Appeal from the superior court of the city and county of San Francisco.

The defendant in this action was indicted and convicted of manslaughter. The defendant then moved for a new trial on the ground of newly-discovered evidence, asking time and process to produce new witnesses, etc. This the court denied. Defendant appealed.

H. E. Highton, for appellant.

The Attorney General, for respondent.

BY THE COURT. In this cause defendant moved for a new trial on the ground, *inter alia*, of newly-discovered evidence. We have examined the affidavits as to such newly-discovered evidence, and think that they bring the application within the rules of law, and that defendant should have a new trial.

The judgment and order are reversed, and the cause remanded that it may be tried anew.

v.3,no.9—39

SUPREME COURT OF CALIFORNIA.

65 Cal. 150

LEAHY v. SOUTHERN PAC. R. Co. (No. 8,912.)

Filed April 24, 1884.

Where no jury has been drawn or summoned to attend the session, the court, in a civil action, may either order a jury drawn and summoned to attend forthwith, or may direct the sheriff to forthwith summon as many men to serve as jurors as may be required.

In an action for damages for death caused by negligence, it is not error to admit evidence of the condition of the remains of deceased.

Where instructions asked are refused, but no exception taken, such rulings cannot be reviewed on appeal.

Where evidence is conflicting, the verdict of the jury will not be disturbed on the ground of insufficiency of evidence to sustain such verdict.

Department 2.

Appeal from the superior court of Santa Clara county.

This was an action by the representatives of William Leahy for damages for his death. The complaint alleged that said Leahy was killed while acting in the capacity of brakeman for defendant, through the negligence of said defendant in having provided imperfect brake machinery on the cars where plaintiff was required to operate. Verdict and judgment were for plaintiff, and defendant appealed.

As errors of the trial court defendant assigned among others the following, viz.: That evidence of the condition of the remains of deceased was improperly admitted, as it tended to excite the sympathy of the jury, and was directly prejudicial to the defendant; that the court erred in denying defendant's motion for a nonsuit on the ground that, though plaintiff had alleged Leahy's death by negligence of defendant, through a defective wheel, they had not offered any evidence to show how Leahy came to his death, nor how the wheel came to be broken; the only facts proven being the time and place of his death, the fact of the breaking of the wheel, and the existence of a flaw in the wheel.

The other facts are stated in the opinion.

McKisick & Rankin, for appellant.

D. M. Delmas, for respondent.

SHARPSTEIN, J. Jurors not having been drawn or summoned to attend the session at which this action was tried, the court was authorized to order a sufficient number to be forthwith drawn and summoned to attend court, or, by an order entered in its minutes, direct the sheriff forthwith to summon so many good and lawful men of the county to serve as jurors, as might be required. Code Civil Proc. 226. The court adopted the latter method. This constitutes no error in law, nor even irregularity in the proceedings of the court.

The exception to the ruling of the court on the defendant's objection to evidence, of the condition of the remains of the deceased, cannot be sustained.

On the question of defendant's negligence there was sufficient evidence introduced by the plaintiff to justify the court in submitting it to the jury.

The motion for nonsuit was properly overruled.

Several instructions were asked by the defendant and refused by the court. But it does not appear that any exception was taken. In the absence of an exception, none of said rulings can be reviewed here.

On the trial certain facts were established beyond controversy: (1) The plaintiff's intestate, Leahy, was killed while in the employment of the defendant as a brakeman on one of its freight trains; (2) there was a flaw or crack in the hub of the wheel, which said Leahy had to turn in order to set up the brake for the purpose of checking the movement of the train; (3) the hub of said wheel was rendered more liable to break by reason of said flaw or crack; (4) if it broke while the brakeman was setting up the brake, there would be great danger of his being precipitated between two cars and killed.

The jury were justified in finding that the death of said Leahy was caused by said wheel breaking while he was in the act of setting up the brake.

Defendant's counsel, however, insist that the flaw or crack in the hub of said wheel was invisible so long as said wheel was in place, and that there is no evidence which tends to prove that said wheel was not sound and safe when placed in position; and that the evidence shows that defendant employed a competent person to inspect said wheel, and that the same was inspected by him as often as a due regard for the safety of the brakeman required that it should be. The plaintiff introduced some evidence which tended to show that said flaw or crack could not have been difficult of discovery when said wheel was in place; and the jury had before it the broken wheel, as well as other wheels of the same kind, and it is impossible for us to say how much the jury may have been aided thereby in determining whether said flaw or crack might have been discovered by the exercise of due diligence on the part of defendant. Upon that question we think there is a substantial conflict of evidence.

It is further claimed on behalf of the defendant that, notwithstanding said flaw or crack, said wheel could not have been broken by said Leahy, if he had not, in violation of a rule of defendant, used a lever or club to set up the brake; and there is evidence tending to prove that Leahy had a club of that description on the train of which he was a brakeman. One witness testified for the defense that on the morning of the accident he saw a brakeman on the defendant's train, at or near the time and place where Leahy was killed, "setting up a brake, on top of a box car, with a club." If the jury had given full

credit to the testimony of this witness, it would doubtless have found that Leahy was the brakeman whom the witness saw on that occasion. Another witness for the defense testified that he found a brakeman's club about 10 hours after the accident, on the railroad track, within 29 steps of the place where he had previously found Leahy's body. That the club so found had been Leahy's is not disputed. There was evidence tending to prove that it was dangerous to use such a club in setting up brakes.

The plaintiff in rebuttal introduced a witness who testified that he saw Leahy just before the accident going towards the wheel which broke, and that when within four feet of it he had no club. Another testified that he, with many others, walked up and down the track where, and soon after, the accident occurred, and that he saw no club, although it was a subject of conversation between him and some of those who were with him. The plaintiff's counsel insists that it is highly improbable that this witness and those who were with him would have overlooked a club, about which they were conversing, if it had been on the track, at the point and in the position where defendant's witness testified to finding it. It is further contended that the jury might well have doubted the accuracy of the witness who testified to having seen a person on the train of which Leahy was a brakeman setting up a brake with a club. That witness was an engineer, who, at the time, had charge of a locomotive to which was attached a train of cars then in motion, on a road which, at that point, runs near defendant's road. As both trains were moving at some distance from each other, it is claimed that he was not in a position to observe accurately the actions of a brakeman on the neighboring train. These were circumstances which the jury might properly consider in determining whether Leahy used a club in setting up the brake on that occasion. The jury had an opportunity for observing the appearance and manner of the witnesses introduced by both sides, and of inspecting the club and broken wheel. Experiments also were made in the presence of the jury, the result of which may have greatly influenced their verdict. How much enlightenment the jury may have derived from these circumstances cannot be estimated by this court. Therefore, a case is not presented in which we would be authorized to hold that the evidence is insufficient to justify the verdict of the jury and the decision of the court on a motion for a new trial.

Judgment and order affirmed.

MYRICK, J., *dissenting*. As I understand the testimony, there is no conflict as to the proposition that the deceased was, at the time of the occurrence, endeavoring to "set up" the brake with the use of a brake-club; that the use of a club was prohibited by the defendant, and that such use contributed directly to the calamity. I therefore dissent. As to the other points referred to in the foregoing opinion, I agree with my associates.

65 Cal. 179

SUPREME COURT OF CALIFORNIA.

JOHNSON v. POWERS.

Filed April 30, 1884.

A complaint to foreclose a mortgage of personal property is equitable, and the special verdicts of a jury thereunder are advisory only.

While original complaint cannot be used in evidence against a plaintiff, after an amended complaint has taken its place as a trial pleading, nevertheless when plaintiff is a witness such original complaint, verified by him, may be introduced on cross-examination to show that plaintiff made the statements contained in them; and such statements, so far as they are contradictory of or inconsistent with his statements as a witness, are as much admissible for the purpose of impeaching him as if they were contained in a letter written by him to a third person, or in an affidavit filed in a distinct proceeding.

If the contract between the vendor and vendee be reduced to writing, nothing which is not found in the writing, except that which is presumed by law from that which is written, (as, for example, warranty of title,) can be considered as a part of the contract.

When the written sale contains no warranty, or expresses the warranty that is given by the vendor, parol evidence is inadmissible to prove the existence of the warranty in the former case or extend it in the latter.

Informal receipts and bills of parcels are apparent exceptions to the rule.

Department 1.

Appeal from the superior court of Alameda county.

The bill of sale mentioned in the opinion is as follows:

"This is to certify that for and in consideration of the sum of six thousand dollars to me in hand paid, the receipt whereof is hereby acknowledged, I have this day bargained and sold, and by these presents do bargain, sell, and convey, to J. A. Johnson and J. B. Wyman the following described property, to-wit, those certain newspapers published in the City of Oakland, County of Alameda, and state of California, known as the 'Oakland Daily Transcript' and the 'Oakland Weekly Transcript,' together with the type, presses, imposing stones, stands, cases, cabinets, galleys, and all other material, of whatever name or nature, as well as the office fixtures, (including the gas-pipes,) furniture, subscription lists, good-will, and patronage, now located and being in Allyn's building, No. 911 Broadway street, in said city of Oakland.

"In witness whereof, I have hereunto set my hand and seal this third day of January, A. D. 1878.

"[Seal.]

O. B. POWERS."

Plaintiffs brought the action to cancel a promissory note given by them to defendant on account of the sale, and to restrain its negotiation, on the ground of fraud. A demurrer to their amended complaint having been sustained, plaintiffs failed to amend, but trial was had on a cross-complaint of defendant to foreclose the mortgage mentioned in the opinion. Plaintiffs' answer to the cross-complaint alleged fraudulent misrepresentations and express warranties. After the trial defendant moved the court to vacate certain special verdicts

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of the jury in plaintiffs' favor and substitute its own findings, and render judgment in defendant's favor, which motion was granted. Plaintiffs then moved for a new trial, which was denied. The other facts sufficiently appear in the opinion. Plaintiffs appealed from the judgment and order denying new trial.

Vrooman & Davis and *C. & C. A. Tuttle*, for appellants.

W. R. Daingerfield and *Edward Lynch*, for respondent.

By THE COURT. 1. Appellant claims the court below had no power to set aside the verdict of the jury, and to find the facts. The substituted cross-complaint contains a statement of facts constituting a cause of action in equity. It was a complaint to foreclose a mortgage of personal property given to secure the payment of a promissory note therein set forth. The court was justified in treating the findings of the jury as advisory only.

2. By the verification of the original complaint the plaintiff made its statements his own. As an amended complaint had been substituted for the original, the latter had ceased to perform any office as a *pleading*, and its averments could not be used to disprove those of the amended complaint. If the adverse party were at liberty to use the first pleading as an admission to overthrow the amended pleading, the party who amends would reap no benefit from his amendment. *Mecham v. McKay*, 37 Cal. 165. So, in *Ponce v. McElvy*, 51 Cal. 222, it was said: "The court below erred in permitting the original complaint to be read in evidence against the plaintiff." But in the case now before us the plaintiff was called as a *witness* on his own behalf, and on cross-examination his attention was called to portions of the original complaint claimed to be inconsistent with his statements as a witness. There is no suggestion that he was not given full opportunity to explain the inconsistencies. The portions of the original complaint were not offered as evidence of any fact other than the fact that the plaintiff made the statements contained in them, and such statements, so far as they were contradictory of or inconsistent with his statements as a witness, were as much admissible, for the purpose of impeaching him, as if they were contained in a letter written by him to a third person, or in an affidavit filed in a distinct proceeding. Code Civil Proc. 2052.

3. The plaintiff's witnesses were allowed to testify fully as to the representations and alleged warranty made by defendant at the time of the sale. During the examination of a witness on behalf of the *defendant*, with reference to the alleged representations claimed by plaintiffs to be false and to constitute a warranty, the court remarked:

"I don't think there is any warranty in this case. The defense here, if any, to the note, is on the ground of fraud. I hold that in this case the plaintiffs cannot prove a warranty made at the time of the sale by parol agreement made between the parties at that time, because of the fact that there was a bill of sale made in writing between them which is silent as to any provision of warranty."

The appellant insists that this was error. The vendor of personal property in his possession warrants his *title* to the same by implication. And whether such sale be by written bill of sale, or oral, the implied warranty of title may be rebutted by parol; that is to say, the vendor may overcome the legal presumption by proof that he did not warrant the title. *Miller v. Van Tassel*, 24 Cal. 458. In such case the vendor does not add to the terms expressed in the writing, but he only rebuts a legal presumption, not itself expressed in writing, but arising from that which is expressed. But, with reference to warranties as to quality, the general rule is that the law does not imply such a warranty. The maxim is *caveat emptor*, and the purchaser has no remedy, except in case of express warranty or fraud. Of course, fraudulent representations as to the value of a business may be proved, although such representations are not embodied in the written contract of sale, because such evidence of fraud goes to show that the contract never had any operation. And in the case now here the court below allowed the fullest latitude to appellant in the examination of witnesses as to alleged fraudulent representations. If the contract between the vendor and vendee be reduced to writing, nothing which is not found in the writing (except that which is presumed by law from that which is written) can be considered as a part of the contract. *Kain v. Old*, 2 Barn. & C. 627. When the written sale contains no warranty, or expresses the warranty that is given by the vendor, parol evidence is inadmissible to prove the existence of the warranty in the former case, or to extend it in the latter. *Benj. Sales*, 621. The apparent exceptions to the rule are where written papers in the nature of informal *receipts* have been held not to embody, and not to have been intended or designed to set out, the terms and conditions of the contract of bargain and sale; as when such a paper merely designates the property, and contains a receipt for the price. *Id.* 622, note *p.* Bills of parcels introduce an exception to the general rule. In *Allen v. Pink*, 4 Mees. & W. 140, there was a memorandum of sale, "Bought of G. Pink, a horse for the sum of £7 2s. 6d. Signed, G. PINK." Lord ABINGERS aid the paper appeared to have been intended merely as an informal receipt, and not as containing the terms of the contract. And in *Filkins v. Whyland*, 24 Barb. 379, the memorandum was: "C. B. Filkins, Bt. of C. Whyland, an horse, \$150. Received payment, C. WHYLAND." On the other hand, a paper purporting to be a receipt, but containing in truth a complete contract between the parties, cannot be explained by parol. 1 Cow. & H. notes, 216, (2d Ed.) 1439; *Niles v. Culver*, 8 Barb. 205; *Goodyear v. Ogden*, 4 Hill, 104. It is obvious that the question is to be determined by the response to the inquiry: "Is this writing more than a receipt? Does it contain the contract?" In the case at bar four paper writings were executed contemporaneously: *First*, a bill of sale by defendant, describing property, and acknowledging the receipt of the purchase price, \$6,000; *second*, a

promissory note of plaintiffs for \$5,500; *third*, a mortgage of the property by plaintiffs to secure the \$5,500 note; *fourth*, a promissory note by plaintiffs for \$500, the balance of the purchase price. It is manifest that these writings contain the terms and conditions of a complete contract, and must be presumed to contain all the terms of the agreement between the parties.

Judgment and order affirmed.

65 Cal. 187

GOLDEN GATE HYDRAULIC MINING Co. v. SUPERIOR COURT OF YUBA.
(No. 9,402.)

Filed April 30, 1884.

Where a mining company is engaged in the business of buying, selling, and working mines, an injunction to restrain it from depositing in certain streams and places the *debris* from its mines, does not suspend the "general and ordinary business of the corporation," merely suspending its conduct of mining operations in a particular manner, and is, therefore, not such an injunction as requires notice to the corporation of the application therefor.

Where an affidavit of personal service of an injunction states that the person served is the managing agent and superintendent of the defendant corporation, as the server is "informed and believes," this return will be *prima facie* evidence of that fact.

Where the evidence of jurisdictional facts in the lower court is conflicting, and there is evidence tending to prove the facts on which the jurisdiction depends, the appellate court will sustain the jurisdiction of the lower court.

Where a corporation or its officers have actual notice of an injunction, they are bound by it, though the injunction be not served at all.

The duty of serving process is not imposed exclusively on the sheriff, and process or notices are not void because served by other parties, if the service be in conformity with the statute.

Corporations are subject to punishment for contempt.

Every court is judge of its own contempt, and the jurisdiction in a contempt proceeding does not depend on the forms which set the proceedings in motion, though they be irregular; it is sufficient if the orders of the court have been disobeyed.

Where a party charged with contempt in disobeying a legal order willfully conceals himself to avoid service of an order to show cause why he should not be adjudged guilty of a contempt, the court is not compelled to wait until personal service can be made, but shall enforce its orders by suitable means conformable to the spirit of the statute; and the service of such order to show cause on the party's attorney is such a means.

Each act violative of an injunction or order of the court is a separate contempt.

Department 1.

Certiorari to the superior court of Yuba county.

Frank H. McNally, for petitioner.

Bliss, Stabler & Bayne, Davis, and Belcher, for respondent.

McKINSTRY, J. The return to the writ of review shows that, in the action "*County of Yuba v. Golden Gate Consolidated Hydraulic Mining Company*," an injunction was issued, *ex parte*, commanding the defendant, its officers, agents, servants, etc., until the further order of the court, "to desist and refrain from depositing or suffering to flow into the channel or bed of the Yuba river, or into the channel or bed of Sucker Flat ravine, or into the tributary streams, gulches, or ravines which lead into said river or ravine, any of the tailings from defendant's hydraulic mines, or the earth, sand, clay, sediment, stones, or other material discharged from said mines, commonly called mining debris." The defendant in that action was by the superior court adjudged guilty of three several contempts in violating the injunction order. We are asked to annul the contempt judgments and the orders which preceded them.

It is claimed by petitioner that the injunction is *void*, because no notice was given petitioner of the application for it. Section 531 of the Code of Civil Procedure provides that an injunction "to suspend the general and ordinary business of a corporation" cannot be granted "without due notice of the application therefor to the proper officers or managing agent of the corporation." It is obvious that petitioner cannot have the order for the injunction annulled because he had an *appeal* from the order granting the injunction. Code Civil Proc. 963, 1068. The point of petitioner is that inasmuch as the injunction was *void*, the petitioner, its servants, etc., were not bound to obey it, and the superior court had no jurisdiction to punish as for contempt any disobedience of it. But the injunction did not suspend the general and ordinary business of the corporation "in buying and selling mining claims, or in working them," but only suspended its conduct of mining operations in a particular manner alleged to injure the plaintiff in the action in which the injunction was issued.

It is further said by petitioner that the injunction was never served on it—the defendant in the action *County of Yuba v. Golden Gate Co.*—because the person on whom it was served was not any officer or agent of the corporation when the service was made. The affidavit of service states that the server personally served the injunction on "W. J. Madden, superintendent and managing agent of said defendant." The subsequent statement that he was "informed and believes" that Madden was superintendent and managing agent, does not detract from the previous statement. He could know the fact only from information derived from some source. The return was *prima facie* evidence of the fact. *Rowe v. Table Mountain W. Co.* 10 Cal. 442.

It is also urged that the court issuing the writ of *certiorari* will review the *evidence* when the jurisdiction of the court to which the writ issues depends upon such evidence; that we should look into the affidavits used on a motion to quash the service. If this be conceded, still, where the evidence is conflicting, and there is evidence

tending to prove the fact on which jurisdiction depends, this court must hold that the court which decided the fact had jurisdiction. Such is the case here. Besides, there is evidence that the petitioner, its officers and agents, had *actual notice* of the injunction. If it and they had such actual notice, they were bound by the injunction, although it was not served at all. High, Inj. (2d Ed.) §§ 14, 21, 22, 23, 24, and notes; *Ex parte Cottrell*, 59 Cal. 421.

It is further claimed that an injunction can be served only by the *sheriff*, and counsel for petitioner cites subdivision *eight* of section 4176 of the Political Code: "The sheriff must serve all process and notices in the manner prescribed by law." The section is found in the chapter defining the duties of sheriff, and does not give to or impose upon him exclusively the duty of serving all process and notices, but requires of him to serve all process and notices directed to him, or placed in his hands for service, which the law commands him to serve when addressed or handed to him. The Code of Civil Procedure does not provide how or by whom an injunction shall be served, but the important matter is that the party enjoined shall have notice, and, the statute being silent, it is at the most sufficient if service is made in conformity with the mode prescribed with reference to service of summons. And this seems to be intimated in *Edmondson v. Mason*, 16 Cal. 388.

The petitioner argues that a corporation cannot commit a contempt. It has been held that a *municipal* corporation cannot be attached for violation of an injunction, but that its officers who disobey the writ may be. *London v. Lynn*, 1 H. Bl. 206; *Davis v. Mayor, etc.*, 1 Duer, 484; *Bass v. City of Shakopee*, 27 Minn. 250; S. C. 6 N. W. Rep. 776. But other corporations may be punished for contempts. *People v. Albany, etc.*, R. R. 12 Abb. Pr. 171; *U. S. v. Memphis, etc.*, R. R. 6 Fed. Rep. 237; *Mayor, etc., N. Y. v. Ferry Co.* 64 N. Y. 624.

Petitioner contends that the affidavits on which contempt proceedings were initiated were insufficient to give the court jurisdiction, because the facts constituting the alleged contempt were not stated therein positively, nor were they described. The facts are set out showing a clear violation of the injunction by the defendant, petitioner here. It is true, they are stated on information and belief; but the jurisdiction of the court to adjudge a contempt, committed out of its presence, does not depend upon the form of the affidavit which sets the proceedings in motion. Here an order to show cause was made, and, if it was served, the defendant had an opportunity to appear and answer any contempt alleged against it. The omissions in the affidavit upon which the order was made may have been irregularities, but the commitment was not based upon such affidavits, but upon the oral testimony of witnesses, and documentary evidence given and introduced on the return-day of the order to show cause. In each case the superior court found that the defendant on a certain

day, in violation of said injunction, and in contempt of the order of the court, did operate its mine, etc., and deposit and flow its *debris*, etc. It is not our province to inquire whether the court below was justified in finding the existence of the facts which constituted the contempt. *Ex parte Cottrell*, 59 Cal. 420; *Ex parte Perkins*, 18 Cal. 60.

The several orders to show cause why the defendant should not be punished for contempt in disobeying the injunction were served upon *attorneys* for defendant. Section 1015 of the Code of Civil Procedure provides that, when a party has an attorney in an action, the service of papers, when required, must be upon the attorney, except * * * of papers to bring him in contempt. And section 1016 reads: "The foregoing provisions of this chapter do not apply to the service of summons or other process, or of any paper, to bring a party into contempt." Section 1212 provides that, when a contempt is not committed in the immediate presence of the court, a warrant of commitment may be granted "upon an order to show cause." There is no express provision in the Codes as to the mode of service of the order to show cause upon a *corporation* in contempt proceedings. It may be conceded, in the view we take, that the order to show cause is "a paper to bring a party into contempt," within the meaning of sections 1015 and 1016; and that, ordinarily, the service of such paper, like that of summons, must be upon "the president or other head of the corporation, secretary, cashier, or managing agent thereof." But in the case at bar it was made to appear to the court, by satisfactory evidence, that diligent efforts had been made to serve an officer or managing agent; that the officers of the corporation had attempted to resign their offices, and that they had *concealed* themselves to avoid service of the order, whereupon the court ordered that service be made upon one or more of the attorneys of defendant.

The question to be considered is: When a party charged with contempt, in disobeying a legal order, willfully conceals himself to avoid service of an order to show cause why he should not be adjudged guilty of a contempt, is the court powerless to proceed or to prevent the continued disregard of its lawful order? It is obvious that the provisions of the Code referred to do not contemplate such concealment. Certainly it is not to be tolerated that a party may defy the court, and continue to violate a restraining order, until personal service can be had of "the paper to bring him into contempt." Every court has inherent jurisdiction to punish a contempt, and the 1209th section of the Code of Civil Procedure, in its enumeration of the acts which are contempts, includes "disobedience of any lawful order," etc. And section 187 of the same Code, which is but declaratory of the common law, reads:

"When jurisdiction is by the constitution or this Code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and, in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the

McKINSTRY, J. This is an action of ejectment to recover the possession of certain lands and premises, \$10,000 damages for the use and occupation, and damages caused by the loss of the value of the rents, issues, and profits, at the rate of \$200 per month from the ninth day of November, A. D. 1880. The court below gave judgment for defendants, from which plaintiff appealed.

The facts of the case, as disclosed by the record, are as follows:

On the fourth day of September, 1876, C. H. Johnson was the owner of the premises described in the complaint, and on that day leased them to one Silva for five years from and after the first day of October, 1876, which lease was on the same day recorded. Silva entered under the lease, and on the thirteenth day of December, 1879, assigned to plaintiff and one Menas. Plaintiff afterwards, and prior to the ninth day of November, 1880, became sole owner of the lease. On the fourth day of May, 1878, C. H. Johnson mortgaged the demanded premises to the respondent San Luis Obispo Bank, which mortgage was the same day duly recorded. The bank brought suit to foreclose the mortgage, and on the nineteenth day of May, 1879, a decree foreclosing said mortgage and ordering the sale of the mortgaged premises was entered. To this suit plaintiff was not made a party. Upon this decree an order of sale was issued February 20, 1880, and the premises were sold at sheriff's sale and bid in by the bank, and on the twenty-seventh day of September, 1880, the bank received the sheriff's deed for the same, which was duly executed and recorded. On the fifth day of October, 1880, an affidavit for a writ of assistance, made by the president of the respondent bank, and notice of motion for the writ, returnable October 12, 1880, were filed in the lower court, and copies of the notice and affidavit were served the same day by the sheriff on C. A. Johnson, Merritt Walker, and plaintiff. On November 6, 1880, the said Johnson, Walker, and plaintiff failing to appear, as required by said notice, the court ordered the writ of assistance to issue. The writ was issued and served, and the respondent bank put in possession of the premises the ninth day of November, 1880. At the trial the plaintiff proved the lease from Johnson to Silva; the entry of the latter thereunder; the assignments of the lease; the continued occupation by Silva and his assigns,—including plaintiff,—and the ouster and withholding by defendant. After proof by defendants of the mortgage foreclosure, and the proceedings on application for writ of assistance, the court below struck out and excluded from the consideration of the jury, all of plaintiff's evidence; and thereupon the court, on motion of defendant, discharged the jury and dismissed the action. To these orders and rulings the plaintiff duly excepted.

It is urged by respondents that the owner of the leasehold and assignor of plaintiff (the latter having taken his assignment after the foreclosure decree) may have been a party to the foreclosure suit and barred by the decree therein. As, however, the plaintiff had proved *prima facie* his right to recover the premises demanded in this action, it was for defendant herein to establish affirmatively that plaintiff or his assignor was barred by the foreclosure decree. It may be conceded, as claimed by respondents, that plaintiff in a foreclosure decree is entitled to a writ of assistance against the mortgagor and those entering under him subsequent to the decree. But plaintiff here did not enter under the mortgagor.

It is contended by respondents that, as plaintiff became interested in the premises subsequently to the rendition of the judgment in the

foreclosure suit, it was incumbent on him to resist the motion for writ of assistance, and his failure to appear and oppose the issuance of the writ stopped him from setting up, at the trial of this action, any claim to the land which he might have set up to defeat the motion for the writ. The right to the exclusive possession for the term, which plaintiff derived from Silva, *antedated* the mortgage to the defendant, the bank. The mortgagee took with notice of the lease, which had been registered. Even if plaintiff had appeared and opposed the issuance of the writ of assistance, and had then and there shown the lease, assignments, and possession under it, if the court, nevertheless, had directed the writ to issue, and the present plaintiff had been removed under it, these facts would not have constituted an adjudication of his rights which would have estopped his assertion of them in a subsequent action. He could not thus be deprived of his right to have his adverse title passed upon by a court and jury. The courts will not undertake to settle the conflicting legal or equitable rights of persons not parties to a foreclosure suit, upon an application for a writ of assistance; to adjudicate such rights upon affidavits or on a motion. *Skinner v. Beatty*, 16 Cal. 157; *Burton v. Lies*, 21 Cal. 88; *Frisbie v. Forgarty*, 34 Cal. 11; *Daniels v. Henderson*, 49 Cal. 242; *Henderson v. McTucker*, 45 Cal. 647.

Judgment reversed, and cause remanded for new trial.

We concur: McKEE, J.; ROSS, J.

65 Cal. 163

SUPREME COURT OF CALIFORNIA.

EVERSDON v. MAYHEW. (No. 9,057.)

Filed April 29, 1884.

A transfer of real property by a trustee, in violation of his trust, is ineffectual to pass any other or greater estate than he himself has; and any one claiming under him, with notice of the trust, stands in the shoes of the trustee as his grantor.

A purchaser of real property from a trustee, in good faith, for a valuable consideration, and without notice, actual or constructive, of the prior equity of the *cestui que trust*, is entitled in a court of equity to its protection against such equitable rights. But where a party has actual notice of such trust, or has constructive notice by reason of the recording of the instruments creating such trust, he is not entitled to protection as a *bona fide* purchaser.

The answer of a *bona fide* purchaser without notice is in the nature of a new case founded on a right as to title to real property, operating, if made out, to bar and avoid the plaintiff's equity, which otherwise must prevail.

Department 1.

Appeal from the superior court of Tehama county.

Chipman & Garter, for appellant.

J. Chadbourne and J. F. Ellison, for respondent.

McKEE, J. On the first day of May, 1865, Ann Wasson, then a widow, with a child by a former husband, entered upon and took possession, under color of title, of "lots numbers 1, 2, 3, 4, and 5, in block number 47, as laid out and designated on the official plat of the town-site of Red Bluff, now on file in the office of the county recorder of the county of Tehama." Upon these premises she had a small dwelling-house, in which she and the child, who is the plaintiff in the action in hand, resided until the year 1866, when the widow intermarried with Henry Wasson; and, after her marriage, she, with her husband and the plaintiff, continued to live there and occupy said premises as her property, until September, 1867, when she died intestate, seized of said premises, and leaving surviving her, as her only heirs at law, her said husband and child. The lots upon which she thus entered and resided, and on which she died, were portions of two tracts of land which constituted the town-site of the town of Red Bluff. These tracts had been entered at the office of the register of the land-office of the United States in California, by the county judge of Tehama county, in trust for the several use and benefit of the occupants thereof, according to their respective interests under acts of congress which provided for the reservation of town-sites upon

public lands of the United States. U. S. Land Laws, 107-109. After the entry had been made, the trustee purchased the lands under the provisions of an act of congress applicable to his trust; and on September 20, 1866, the government of the United States issued the patent to Warner Earll, the county judge of said county, and to his successors and assigns, for said lands, as the town-site of said town, in trust for the several use and benefit of the occupants of said lands according to their respective interests. Congress provided that the execution of this trust, as to the disposal of the lots in said town, and the proceeds of the sales thereof, were to be conducted under such regulations as would be prescribed by the legislative authority of the state, (section 294, p. 109, *supra*,) and on the sixth of March, 1868, the legislature passed an act which authorized the trustee to distribute the town lots held by him in trust for the citizens of the town of Red Bluff, and to issue certificates of title to the inhabitants of the town, in accordance with their respective interest, in the manner prescribed by the act. St. 1867-68, p. 107.

The acts of congress, under which the foregoing proceedings were had, vested the widow, as the original and *bona fide* occupant of the town lots in dispute, with an equitable title to the same; and as she acquired the property before her marriage with Wasson, it was, by the laws of the state, her separate property. The protection of her title to this property was one of the objects of the congressional legislation upon the subject of town-sites upon the public domain. *Alemapy v. Petaluma* and *Jones v. Petaluma*, 38 Cal. 379, 533. Had she lived, she would have had the right to perfect her equitable title to the property, by obtaining from the trustee, when he came to execute his trust, under the regulations prescribed by the state, a certificate of legal title. She died, however, before the state directed how the trust should be executed, and her estate in the property descended to her heirs. *Grover v. Hawley*, 5 Cal. 486. As one of these heirs, the plaintiff succeeded to an undivided one-half interest in the lots, with the surviving husband as the owner of the other half. Wasson and the plaintiff thus became co-heirs and tenants in common of the property. During the existence of that legal relation, Wasson, the adult tenant in common, on July 6, 1868, obtained from the trustee the certificate of title to the lots in his own name; and, soon after obtaining it, conveyed them to one Bryant, who, in turn, conveyed them by deed to the defendant. But the acquisition by Wasson of the legal title inured to the benefit of himself and his infant co-tenant, whose rights he was bound to protect.

It is urged that the plaintiff did not enter after the death of her mother, and that she was not a beneficiary under the acts of congress when the legal title was obtained. But at the death of her mother she was an infant about 10 years of age, and her co-heir entered after the death. His entry, therefore, inured to her benefit; and he took and held the legal title to her undivided half interest in trust for her. "When,"

says Chancellor KENT, in *Van Horne v. Fonda*, 5 Johns. Ch. 388, "two devisees are in possession under an imperfect title, derived from the common ancestor, there would seem, naturally and equitably, to arise an obligation between them, resulting from their joint claim and community of interests, that one of them should not affect the claim to the prejudice of the other. It is not consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject, created, that one of them should be able without the consent of the other to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion." Wasson, therefore, by the acquisition of the legal title, became the absolute owner of his own interest in the property, and the trustee of the legal title to the interest of the plaintiff therein. Being her trustee, he held the title for her benefit; and it was a violation of his trust for him to transfer her title to another. But the transfer was ineffectual to pass any other or greater estate than the trustee had; the person to whom he transferred it, and any one claiming under him, with notice of the trust, stood in the shoes of the trustee as their grantor. That was the position of the defendant, and the legal title to the plaintiff's interest in the lots, which he derived from the trustee, was in the hands of the defendant, subject to the control of the superior equitable right of the plaintiff, unless he was entitled to the protection of a court of equity against the equitable rights, as a *bona fide* purchaser without notice.

That constitutes the staple of the principal defense which the defendant makes to the action. In his answer he alleges "that he purchased said premises in good faith, and without any notice or knowledge of any right, title, or interest of the plaintiff in or to the same." Upon this pleading the court found, as fact, that the defendant purchased the lots in controversy in good faith, and paid the sum of \$200 therefor, and immediately after the purchase entered upon and took possession of the same; and, as law, that he was a *bona fide* purchaser of the lots for a valuable consideration, without notice or knowledge of the plaintiff's claim or interest in the same, at the time of making his purchase. This finding is not sustained by the evidence. Without conflict, the evidence in the record shows that the defendant, when he purchased, had knowledge from the records of the title that the lots had been claimed by the wife of Wasson, under a deed to her, before her marriage with him, from one George Stafford, which was recorded on page 440, in Record Book E, in the recorder's office of Tehama county; that she had occupied the lots under that deed, and died seized of the same; and that her husband after her death, in his application for the legal title, claimed it only as an heir at law of his deceased wife. He admits that he examined the record of the title before buying from the husband, and that about or after the time of his purchase he tried to obtain a deed from the plaintiff, but could not, because of her infancy. A purchaser with

such knowledge, or, which is equivalent to the same thing, such means of knowledge, is not a purchaser without notice. Besides, the answer does not contain the allegations of, nor does the finding establish, such a purchase, in good faith, for a valuable consideration, without notice, actual or constructive, as entitled the defendant to be protected against the prior equity of the plaintiff.

The answer of a *bona fide* purchaser without notice is, says the supreme court of the United States, in the nature of a new case founded on a right as to title to real property, operating, if made out, to bar and avoid the plaintiff's equity, which otherwise must prevail. *Boone v. Chiles*, 10 Pet. 210. To entitle a party to protection, as such a purchaser, he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money in good faith, and without notice, actual or constructive, *prior to and down to the time of its payment*; for if he had notice, actual or constructive, at any moment of time before the payment of the money, he is not a *bona fide* purchaser. *Boone v. Chiles*, 10 Pet. 210, 213; *Wallwyn v. Lee*, 9 Ves. Jr. 32; *Scott v. Umbarger*, 41 Cal. 419; *Taylor v. Ranney*, 4 Hill, 624; *Wells v. Morrow*, 38 Ala. 128; *Pearce v. Foreman*, 29 Ark. 568.

Judgment and order reversed, and cause remanded for a new trial.

We concur: ROSS, J.; MCKINSTRY, J.

(65 Cal. 216)

Ex parte MOAN. (No. 10,974.)

Filed May 2, 1884

When a person charged with murder is arrested and taken before a justice of the peace, and by him held for examination, and he subsequently is examined before another justice of the peace and held to answer, it is not necessary, to confer jurisdiction on such second magistrate, that another complaint be made and a second warrant issued.

When a prisoner is arraigned, pleads not guilty, but fails to move to set aside the information, he is thereby precluded from taking the objection that he has not been examined and committed in the manner required by law.

Where the statute provides that the prosecution in a criminal cause must be dismissed unless the person is held to answer, or an information filed against him within 30 days thereafter, and an information is filed by the district attorney within that time, the previous action of the grand jury in examining the case and ignoring the bill does not entitle the defendant to a discharge.

Department 1.

Application for writ a of *habeas corpus*.

E. M. Gibson and Willes Whitmore, for petitioner.

MORRISON, C. J. This is an application for discharge on *habeas corpus*, founded on the following state of facts: On the twenty-fifth day of September, 1883, a complaint was filed before one Emil Nusbaumer, a justice of the peace of Oakland township, charging the petitioner with the crime of murder, and thereupon he was arrested on the following day, and taken before the magistrate issuing the warrant, by whom an order of commitment for examination was made. On the first day of October, 1883, the petitioner was taken before another justice of the peace of the same township, by whom he was examined and committed, but no warrant for his arrest was issued by the latter magistrate.

1. It is claimed, on behalf of the petitioner, that the magistrate who issued the warrant, and *he alone*, had power to examine the case; that the second magistrate had no jurisdiction over the case; and that all proceedings had before him were therefore void. The reason why the petitioner was taken before a magistrate other than the one issuing the warrant does not appear, and therefore is simply a matter of conjecture. The following is the provision of the Penal Code bearing upon this subject:

"If the offense charged is a felony, the officer making the arrest must take the defendant before the magistrate who issued the warrant, or some other magistrate of the same county, as provided in section eight hundred and twenty-four." See Penal Code, § 821.

Section 824 of the same Code is as follows:

"If, on the admission of the defendant to bail, the bail is not forthwith given, the officer must take the defendant before the magistrate who issued the warrant, or, in case of his absence or inability to act, before the nearest or most accessible magistrate in the same county, and must at the same time deliver to the magistrate the warrant, with his return thereon indorsed and subscribed by him."

All this was done, and the magistrate before whom the petitioner was taken was, as has already been stated, of the same township and county.

By section 826 of the same Code it is provided that "if the defendant is brought before a magistrate other than the one who issued the warrant, the depositions on which the warrant was granted must be sent to that magistrate, or, if they cannot be procured, the prosecutor and his witnesses must be summoned to give their testimony anew." It is claimed here that to give the magistrate, before whom the petitioner was examined and held to answer, jurisdiction, it was necessary for a complaint to be made and to have another warrant issued. We do not think so. The second magistrate had jurisdiction in this case without a second warrant of arrest. The defendant was already before him, and he had full power under the provisions of the Code to proceed with, examine the case, and hold the party to answer. We are therefore of the opinion that the petitioner should not be discharged on this ground.

2. In the next place it is contended that there was no commitment in this case. We find the following order:

"It appearing to me that the offense of manslaughter has been committed, and that there is sufficient cause to believe the within-named Edward Moan guilty thereof, I order that he be held to answer to the same, and that he be admitted to bail in the sum of \$2,500.

"Dated October 1, 1883.

A. M. CHURCH, Justice of the Peace."

We think that the commitment was sufficient under section 872 of the Penal Code. But even if it were not, it does not follow that the defendant is entitled to a discharge on *habeas corpus*. The defendant was prosecuted by information in the superior court of Alameda county, and was found guilty of the crime of manslaughter. By section 995 of the Penal Code it is provided that an information must be set aside by the court in two cases only. (1) When, before the filing thereof, the defendant had not been legally committed by a magistrate; and (2) when the information is not signed by the district attorney of the county. By the following section it is provided that if a motion to set aside the information is not made, the defendant is precluded from afterwards taking these objections. When the defendant in this case was arraigned and pleaded not guilty, and did not move to set aside the information, he was thereby precluded from taking the objection that he had not been examined and committed in the manner required by law.

3. The third ground relied upon by the petitioner is that the charge against him had been presented to the grand jury and the bill dismissed. The contention is that, by virtue of section 942 of the Penal Code, the dismissal of the bill by the grand jury was an end of the prosecution, without an order of the court resubmitting it. By section 1382 of the same Code it is provided that "the court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: (1) When a person has been held to answer for a public offense, if an indictment is not found or an information filed against him within thirty days thereafter." The information was filed by the district attorney within 30 days after the commitment of the defendant, and we think the district attorney had a right under the statute to file it. The previous action of the grand jury in examining the case, and ignoring the bill, did not take away his statutory right. See *Ex parte Clarke*, 54 Cal. 415.

4. The last point made is that the information does not charge any offense. We think there is a crime charged in the information, and therefore the point is not well taken.

Our judgment is that the prisoner should be remanded, and the writ dismissed. It is so ordered.

We concur: MCKINSTRY, J.; SHARPSTEIN, J.

HOWELL v. FOSTER. (No. 9,032.)

Filed April 30, 1884.

Where a verified complaint alleges the wrongful attachment of certain property by defendant, and the verified answer admits the attachment, but avers that said property has been replevied by plaintiff, and affirmatively alleges defendant's right to the return of such property, it is error for the trial court to allow an amendment to the complaint striking out the portions thereof which refer to such property, and to strike out the portions of defendant's answer referring thereto, thereby taking from defendant an opportunity to try the question of his right to the return of such property.

Where one man farms land of another, and agrees to give the owner a part of the crop raised, for use of the land, he and the owner, in the absence of stipulation, become tenants in common of the crop raised. But the parties may so agree as to secure to the owner of the land the ownership of the product until the performance of a certain stated condition. In the latter case the tenant has no attachable interest until performance of the condition.

An attaching creditor acquires no greater right in attached property than the defendant had at the time of attachment. If the defendant has lost his power over it, or not yet acquired an interest permitting him to dispose of it, it cannot be attached for his debt.

Department 1.

Appeal from the superior court of Tehama county.

J. F. Allison, for appellant.*Chipman & Garter*, for respondent.

Ross, J. The plaintiff brought this action to recover the possession of 4,455 sacks of wheat, 764 sacks of barley, and 230 head of hogs. In his complaint, which was verified, he alleged that he was the owner of the grain and hogs, and that defendant had, without his consent, taken the said property into his possession, and continued to withhold it from the plaintiff. Defendant, who, at the times mentioned in the record, was sheriff of Tehama county, answering the complaint,—the answer being also verified,—denied the ownership by the plaintiff of the property in question, and alleged that the same was owned by the plaintiff and one Mayfield, as tenants in common, and that in his official capacity he (defendant) levied upon and took all of the property into his possession, under and by virtue of two certain writs of attachment duly issued out of the superior court of Tehama county in certain actions against Mayfield. Defendant also alleged in his answer that after his levy, the plaintiff, by virtue of a writ of replevin, took all of the property from his (defendant's) possession, and asked a return thereof to him, to be held subject to the aforesaid writs of attachment. When the case came on for trial, the court below, on motion of the plaintiff, and against the objection and exception of the defendant, allowed the plaintiff to amend his complaint by striking

therefrom all of the allegations in relation to the 230 head of hogs, and also struck out of the defendant's answer all reference thereto. This was done upon the verbal statement of plaintiff's counsel that the defendant had not in fact levied the writs of attachment upon the hogs. But not only did the verified complaint of the plaintiff show that defendant had taken the hogs, but defendant, in his verified answer, alleged that he had levied upon them, and further alleged that subsequently to his levy the plaintiff, by virtue of a writ of replevin, had taken the hogs from his (defendant's) possession. Under such circumstances the court below erred in allowing the amendment to the complaint, and in striking out the portions of the answer referred to; for, if the averments of the answer were true, the effect of the action of the court was to take the hogs from the possession of the defendant and transfer them to the plaintiff without affording the defendant an opportunity to try the question of his right to their return, which he affirmatively alleged. For this error we must reverse the judgment and remand the cause for a new trial; and, as there must be a new trial, it is proper that we should pass upon the other question in the case.

The action of the court below, in the respect already indicated, left the case to be tried only as to the wheat and barley; and it was as to that only that the case was tried. Upon this branch of the case the question is, did Mayfield have an attachable interest in the grain? It was raised by him on land belonging to the plaintiff, under a written instrument by which the plaintiff leased and demised to Mayfield the land for a certain term, with the covenant, among others, on the part of Mayfield, that he would till and cultivate the land in a good farmer-like manner, and, at the proper time, would sow the land to wheat, oats, or barley, or proportions of each; and, at the proper time, would harvest, thresh, clean, and sack the grain, and thereupon deliver all of it to plaintiff, to be held by him as security for all advances made by him to Mayfield, together with interest thereon, at the rate of $1\frac{1}{2}$ per cent. per month; "and," proceeds the contract, "such demands being satisfied, the said party of the first part [plaintiff] agrees, that upon said grain being sacked and delivered as aforesaid, he will deliver and transfer to the said party of the second part [Mayfield] his three-fourths of said grain, quality and quantity considered." The instrument contained this further clause:

"And it is mutually covenanted and agreed that until such delivery and transfer by the said party of the first part [plaintiff] all of said grain shall be the property of the said party of the first part, and the said party of the second part [Mayfield] shall have no right to dispose of any portion thereof."

There was also a provision to the effect that the grain should be delivered, after it was sacked, at the nearest depot or warehouse, and that the plaintiff should pay one-fourth of the cost of hauling it and one-fourth of the cost of the sacks used. There is no doubt that

where one man farms land of another, under an agreement by which he is to give the owner a part of the crop raised for its use, he and the owner, in the absence of a stipulation providing otherwise, become tenants in common of the crops raised. But it is just as clear that the agreement between the parties may be so framed as to secure to the owner of the land the ownership of the product until the performance of a certain stated condition. *Wentworth v. Miller*, 53 Cal. 9; *Andrew v. Newcomb*, 32 N. Y. 419; *Lewis v. Lyman*, 22 Pick. 437; *Ponder v. Rhea*, 32 Ark. 435; *Smith v. Atkins*, 18 Vt. 461. In the present case, the parties expressly agreed that all of the grain raised on the land by Mayfield should be delivered to the plaintiff, and remain his property, and in no way subject to the disposal of Mayfield until all of such advances as the plaintiff may have made him had been satisfied, and he had thereupon received from the plaintiff his share of the grain, which plaintiff bound himself to deliver. Until all this happened, all of the grain, by the express contract of the parties, was to be and remain the property of the plaintiff, and in no way subject to the disposal of Mayfield. That it was competent for the parties so to provide has already been shown, and having so provided, it results that Mayfield had no attachable interest in the grain at the time of the levy or the writs in question. "It is a fundamental principle," says Drake, *Attachm.* § 245, "that an attaching creditor can acquire no greater right in attached property than the defendant had at the time of the attachment. If, therefore, the property be in such a situation that the defendant has lost his power over it, or has not yet acquired such interest in or power over it as to permit him to dispose of it adversely to others, it cannot be attached for his debt." See, also, authorities cited in support of the text, and *Tuohy v. Wingfield*, 52 Cal. 319.

Our conclusion is that the ruling of the court below was right with respect to the grain, but erroneous in regard to the hogs involved in the controversy.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MCKINSTRY, J.; MCKEE, J.

Filed April 30, 1884.

Death resulting from an assault made without the use of a deadly weapon, instrument, means, or force likely to produce great bodily injury, (being itself an unlawful act, not amounting to a felony,) is manslaughter, and not murder.

A person must be presumed to do that which he voluntarily and willfully does in fact do, and that he intends all the natural, probable, and usual consequences of his own act, but not all the possible consequences of his act.

In bank.

Appeal from the superior court of Stanislaus county.

Wright & Hazen, for appellant.

The Attorney General, for respondent.

MORRISON, C. J. The defendant was convicted of the crime of murder of the second degree, and was sentenced to imprisonment for life in the state prison. The killing occurred in the town of Turlock, in the county of Stanislaus, on the twelfth day of August, 1883, under circumstances substantially as follows: The defendant, Albert Case, the deceased, and several others, were in a saloon kept by one Ross, at the hour of 9 or 10 o'clock at night, when an exchange of words occurred between the defendant and the deceased. What the exact words were does not clearly appear from the evidence. Suffice it to say they were words of insult from the defendant, and of remonstrance on the part of the deceased. There was, however, no angry discussion, and persons present thought the defendant was jesting rather than in earnest. Case was sitting near the door, and defendant standing at the bar, of the saloon. The latter walked over to where the former was sitting, and, after the exchange of some words, struck the former either two or three blows with his fist. The blows fell on the face or head of the deceased, and did not, at the time or immediately afterwards, seem to produce any serious effect. How severe the blows were does not clearly appear, but they must have been dealt with a good deal of force. The deceased was a lad of 16 or 17, well developed and largely grown for his age, and was nearly or quite as large as the defendant. The morning after the infliction of the injury the deceased, Case, was found lying on the ground, dead, near the room in which he slept. The *post mortem* examination showed that there was a fracture of the skull just above the right ear, and a large clot of blood on the inside of the skull. This came from the rupture of an artery, and was pronounced by the physician making the autopsy to be the cause of death.

The principal question in the case which we deem it necessary to consider is, did the facts, admitting them in their full force and effect,

constitute murder? This degree of homicide is defined by Penal Code, § 187, to be the unlawful killing of a human being with malice aforethought; whereas, manslaughter is the unlawful killing of a human being without malice. Id. § 192. "It is of two kinds: (1) Voluntary, upon a sudden quarrel or heat of passion. (2) Involuntary, in the commission of an *unlawful act not amounting to felony*; or, in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution or circumspection."

It may be conceded that an assault with the fist, or without the use of a deadly weapon, may be made in such a manner and under such circumstances as to make the killing murder; but the law draws a broad distinction in cases generally between an assault committed with a deadly weapon, and a simple assault and battery. The former amounts to a felony, whereas the other is merely a misdemeanor. Section 240 of the Penal Code provides that "an assault is an unlawful attempt, coupled with a present ability to commit a violent injury on the person of another. A battery is any willful and unlawful use of force or violence on the person of another." Section 242. A battery is punishable by fine or imprisonment in the county jail, or both. Section 243. An assault with a deadly weapon, or by any means or force, likely to produce great bodily injury, is declared to be a felony, and is punishable by imprisonment in the state prison. Section 245.

In the case of the *People v. Murat*, 45 Cal. 281, it was held that an assault made without the use of a deadly weapon with intent to do mere bodily harm, and not to do murder, is a misdemeanor, nothing more.

In the trial of cases of homicide committed by violence it is almost always important to consider the character of the weapon with which the homicide was committed, and all through the cases great emphasis is laid on the fact that a weapon likely to produce death was used by the accused. If the means employed be not dangerous to life, or, in other words, if the blows causing death are inflicted with the fist, and there are no aggravating circumstances, the law will not raise the implication of malice aforethought, which must exist to make the crime murder. The distinguishing characteristic respecting the two crimes of murder and manslaughter is malice. Without the presence of this element of malice the crime does not reach the higher degree of murder, but amounts simply to manslaughter.

We will consider a few of the cases in which the distinction is clearly drawn. If a party participate in a homicide, intending only to commit an assault and battery, he is guilty of manslaughter only. *Brown v. State*, 28 Ga. 200. Beating and striking a wife violently with the open hand, the blows being illegal, the killing of the wife in such manner is manslaughter. *Com. v. McAfee*, 108 Mass. 461. If A. and B. agree to assault C. with their fists, and C. receives chance blows from either, producing death, both are guilty of manslaughter.

Reg. v. Caton, 12 Cox, C. C. 624. When death ensues in pursuit of an unlawful design, without any intention to kill, it will be murder or manslaughter, as the intended offense is felony or only a misdemeanor. *Smith v. State*, 33 Me. 55; Foster, 268. The case of *Wellar v. People*, 30 Mich. 16, is a very instructive one on the point we are now considering, and it was there held that "in general, when the assault is not committed with a deadly weapon, the intent must be clearly felonious to make the killing constitute murder, * * * and in such a case the deadly intent ought to be left in no doubt." The willful use of a deadly weapon, without excuse or provocation, in such a manner as to imperil life, is almost universally recognized as showing a felonious intent. 2 Bish. Crim. Law, §§ 680, 681. But when the weapon or implement used is not likely to kill or maim, the killing is held to be manslaughter, unless there is an actual intent which shows a felonious purpose. See cases cited in 30 Mich. 16.

It does not appear from the evidence in this case that there was any intention on the part of the defendant to kill the deceased, and the physician who made the *post mortem* states that an ordinary blow would not have produced the fracture which resulted in the death of Case. It appears, too, that the blow happened by chance to fall upon that portion of the skull which is the thinnest and most easily fractured. There certainly was no design or intent on the part of the defendant that it should. If the blow had fallen a little higher or a little lower on the skull, the result, in all human probability, would not have been fatal. If death had not ensued the defendant would have been guilty of a simple assault and battery under the Penal Code, as the assault was not with a dangerous weapon or instrument, or by any means or force likely to produce great bodily injury. If the party had not died from the injury, the defendant would have been guilty of a misdemeanor only, and not a felony. The killing of Albert Case, not having been intended, but resulting from an unlawful act, not amounting to a felony, was therefore manslaughter, and not murder.

We will now consider one of the instructions given by the court to the jury. It was as follows:

"Intent is generally inferred from the commission of the act. If a man knowingly and wilfully does an act unlawful in itself, and it produces harm, the law conclusively infers that such harm was intended. The law presumes that the natural, necessary, and even possible consequences were intended by the author of the act. If of sound mind, the natural and proximate consequences. And if the act intended was unlawful, even the possible consequences. So, if the act produces harm not intended, it holds him responsible for all the consequences."

This instruction ignores all distinction between the intent to commit an act, amounting only to a misdemeanor, and one that would, if committed, be a felony. We have endeavored to point out the distinction. In our opinion the instruction was too broad and was well calculated to mislead the jury under the circumstances of this case.

The language of Chief Justice SHAW, in the case of *Com. v. Webster*, 5 Cush. 305, is as follows: "This rule is founded on the plain and obvious principle that a person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and that he must intend all the *natural, probable, and usual* consequences of his own act."

To hold the defendant liable for all *possible* consequences of his act, and to the full extent of the rule laid down by the court, would be dangerous in the extreme.

For the reasons herein set forth the judgment and order are reversed, and the cause remanded for a new trial.

We concur: SHARPSTEIN, J.; THORNTON, J.

Ross, J. I concur upon the ground last stated in the opinion.

McKINSTRY and MYRICK, JJ. We concur in the judgment and in the opinion that the instruction, as to responsibility for all *possible* consequences, was erroneous.

2 Cal. Unrep. 295

PEOPLE v. BURT. (No. 10,835.)

Filed April 28, 1884.

Where the question is one of mere preponderance of evidence, the judgment of the lower court will not be disturbed.

In bank.

The Attorney General, for appellant.

Nygh & Fairweather and *Henry E. Highton*, for respondent.

By THE COURT. This is an appeal taken by the people from an order of the superior court granting the defendant a new trial, after he had been found guilty of the crime of embezzlement. The learned judge who tried the case, and heard all the evidence, was not satisfied with the verdict of the jury, and therefore set the same aside and granted a new trial. There was a conflict in the evidence, and we are not disposed, under the circumstances of this case, to interfere with the action of the trial court. In *People v. Ashnauer*, 47 Cal. 98, the court say: "It is well settled that this court will not deal with a question of the mere preponderance of evidence." See, also, *People v. Gill*, 45 Cal. 285.

Order affirmed.

2 Cal. Unrep. 296

LORENZ and others v. JACOBS and others. (No. 9,212.)

Filed April 29, 1884.

To constitute a cause of action, it is sufficient to allege the facts simply, without setting out matter tending to prove them.

If plaintiffs have a clear legal right in the subject-matter of an action, and that right is being materially injured by wrongful acts complained of, the sufficiency of such a cause of action cannot be attacked by general demurrer for imperfect averment. Such errors can only be reached by a special demurrer.

Where one of two or more co-owners, in the use of water of a stream appropriated by them for beneficial purposes, diverts for use a greater quantity of water than of right belongs to him, so as to materially diminish the quantity to which the others are entitled, such parties are entitled to enjoin the wrong-doer from diverting the water to their injury.

Where, in an action to determine water-rights, the right of property is put in issue, the judgment roll in a former action is admissible to prove the interest in such property of the parties bound by such judgment.

Department 1.

Appeal from the superior court of Trinity county.

Clay W. Taylor and W. J. Tinnin, for appellants.*E. D. Wheeler, E. E. Williams, and H. W. Phillbrook*, for respondents.

McKEE, J. The assignments of error which have been argued upon this appeal are: (1) That the complaint does not contain facts sufficient to constitute a cause of action. (2) That the court erred in admitting in evidence, against defendants' objections, the record of a former judgment.

1. The complaint is not artistically drawn; yet, in its verbiage, the following facts, although defectively and illogically stated, sufficiently appear, viz.: That, in 1882, the plaintiffs were the exclusive owners, by prior appropriation, of the right to divert and use all the water of a stream called "Connor creek," except a sluice-head of 20 inches, or "so much as will flow without pressure through an aperture ten inches in length and two inches in height," and the surplus of the natural flow of the stream not appropriated by the plaintiffs; that "in the vicinity of Red Hill, Trinity county, state of California," the plaintiffs had constructed four ditches, which connected with and tapped the creek, by means of which they brought the water from the creek "to the mining ground in that locality," for use in mining and other useful purposes; and that, while engaged in the exercise of their right, the defendants disturbed them in its enjoyment, by wrongfully diverting so much of the water of the creek in excess of the "sluice-head" to which they are first entitled, as to materially diminish the quantity which the plaintiffs are entitled to have flow through their

ditches to their mining ground for mining purposes; and this wrong the defendants threaten to continue, so as to deprive the plaintiffs of their right to the use of the water of said creek; therefore the plaintiffs ask that the defendants be adjudged to pay damages for their wrongful acts in the past, and be perpetually enjoined from continuing to commit them in the future.

It is urged that the complaint is fatally defective, because it contains no distinctive averments of the date of location, location, size, grade, or capacity to carry water of any of the plaintiffs' ditches; and because it contains no averment that "Connor creek," or any of the ditches are in the county of Trinity. But all these are only subordinate facts tending to prove the ultimate fact of the legal right in the subject-matter of the action asserted by the plaintiffs. As subordinate facts they are not essential to the statement of the cause of action. When a state of facts is relied on to constitute a cause of action, it is sufficient to allege the facts simply without setting out the facts tending to prove them. If the facts stated are sufficient to constitute a cause of action, their sufficiency cannot be successfully assailed by a general demurrer for imperfect averments of the facts. Such errors in a pleading can be reached only by special demurrer. In the presence of a general demurrer a complaint is sufficient which shows that the plaintiffs have a clear legal right in the subject-matter of the action, and that the right is being materially injured by the wrongful acts complained of.

Here the injury complained of is in the improper diversion of the water of a water-course by the defendants as co-owners with the plaintiffs in the flow of the water; and the law is well-settled that where any one of two or more co-owners in the use of the water of a stream, which has been appropriated by them for a beneficial purpose, diverts for use a greater quantity of the water than of right belongs to him, so as to perceptibly reduce the volume of water flowing in the stream, and to materially diminish the quantity to which the others are entitled, in consequence of which they are damaged and their right violated, such parties are entitled to an injunction enjoining the wrong-doer from diverting the water to their injury. Story, Eq. Jur. § 927.

2. By his answer each of the defendants asserted a right to use the water to a greater extent than the plaintiffs admitted belonged to them. The question, therefore, at issue in the case was the quantitative interest of the parties, plaintiffs and defendants, in the natural flow of the creek. Upon that question the plaintiffs gave in evidence, over the exception of the defendants, the judgment roll in a former action, in which Henry Lorenz, one of the present plaintiffs, Nicholas Lorenz, and Jacob Liebrandt were plaintiffs, and Bartol and Henry Jacobs, (two of the present defendants,) and David Evans and Charles H. Bartlett, (two of the present plaintiffs,) were defendants, for the partition, or sale, if a partition could not be had, of one of the

ditches mentioned in the complaint in this case, and "the first flow of the water of the creek known as 'Connor creek,' to the extent of 1,000 inches on a grade of two inches to the rod." To that action the parties defendants appeared and answered. By his answer Henry Jacobs denied that "he was a tenant in common with the plaintiffs of the property described in the pleadings, or otherwise, or at all, or that he had or claimed any estate or interest therein." That answer raised an issue upon which evidence was taken. Upon the proof the court found for the defendant Henry; and, after finding that all the other defendants were tenants in common with the plaintiff of the property sought to be partitioned, the court, after it had ascertained and determined the extent of the interest of the respective tenants in common, ordered a sale of the property and a distribution of the proceeds between them according to their respective interests. A sale was had, which was afterwards confirmed, and final judgment was regularly entered.

The ditch property which was sold under that judgment was part of the property involved in this case. The judgment determined that all the parties in that action, except the defendant Henry, were tenants in common in the property, and that the defendant Henry was not a tenant in common, and had no interest in the property. Both these facts were directly put in issue, and were found. The finding of the last fact would have been unnecessary if the defendant Henry had filed a disclaimer, and had had the action dismissed as to him; but he did not. He took issue with the averment of the plaintiffs' complaint. That was not the formal renunciation of all claim to the subject-matter in the suit, which is known in law as a disclaimer. *De Uprey v. De Uprey*, 27 Cal. 335; *Brooks v. Calderwood*, 34 Cal. 563. Having, by his answer, raised an issue which involved trial and determination, he became bound by the decision upon the question at issue, and the record of the judgment was admissible in evidence in this case, not only for the purpose of proving the extent of the interest in the property which the plaintiffs acquired at the sale, which was confirmed by the judgment, but also for the purpose of proving that the defendant Henry had no interest in the property. *Morenhout v. Higuera*, 32 Cal. 294; *Hancock v. Lopez*, 53 Cal. 362.

There is no prejudicial error in the record.

Judgment and order affirmed.

McKINSTRY, J. I concur.

ROSS, J. I concur in the judgment.

SUPREME COURT OF CALIFORNIA.

(2 Cal. Unrep. 300)

In re LOWENTHAL. (No. 8,559.)

Filed April 29, 1884.

Evidence *held* insufficient to justify the defendant's removal or suspension from practice at the bar as an attorney and counselor.

In bank. Proceeding for disbarment of an attorney.

The defendant, an attorney and counselor entitled to practice in all the courts of the state, was accused of being a person of immoral character and bad repute, and, as such, not entitled to practice; and further, that he was of such character at the time of his admission to practice, and that he obtained his license to practice by fraudulent concealment of such facts.

J. L. Crittenden, for petitioners.

W. W. Cope, for defendant.

BY THE COURT. This is a proceeding, under section 287 and following sections of the Code of Civil Procedure, to remove or suspend an attorney and counselor of this court. The accusation was made in due form, and, being wholly denied, a reference was made under section 298 to William Craig, Esq. Mr. Craig has filed his report, accompanied by the evidence taken by him in support of the accusation, as well as that produced by the defense. We have examined the evidence in the case, and do not find it sufficient to justify a removal or suspension of Mr. Lowenthal, and the charges are therefore dismissed.

(65 Cal. 161)

LOCKE v. PETERS. (No. 8,144.)

Filed April 29, 1884.

A demurrer cannot be directed to certain lines or pages of a pleading, but must be directed to the whole of the pleading, or to a particular and separate count or statement of a cause of action or defense.

In an action of ejectment for the recovery of real property, damages for the withholding, and for rents and profits thereof, cannot be recovered unless judgment is also given for recovery of the possession of the demanded premises.

The uniting of a claim for specific real property with a claim for damages for the withholding thereof, and for rents and profits of the same, is proper, and authorized by the statute.

Department 1. Appeal from the superior court of San Joaquin county.

This was an action in ejectment to recover possession of certain real property, and for damages for the withholding thereof, and for rents and profits. Defendant answered, denying the allegations in the complaint. Plaintiff demurred to certain lines of defendant's answer, on the ground that they did not state facts sufficient to constitute a defense to said action. The court sustained the demurrer, and defendant excepted to the ruling. The cause was tried before a jury, who found a verdict for plaintiff in the sum of \$500, and thereon judgment was rendered for such amount in favor of plaintiff. Defendant appealed.

Terry, McKinne & Terry, for appellant.

Byers & Elliot, for respondent.

McKINSTRY, J. If, as alleged in the amended answer, all the right, title, or interest of plaintiff to the demanded premises was acquired from the Lodi Mill & Warehouse Company after the execution and registration of the five years' lease by that company to Ellis, the entry of Ellis thereunder, and the occupation of defendant with the consent and approval of Ellis and the company, these facts would have been admissible under the denials of the complaint-averments contained in the amended answer. The term of the lease was five years from March 30, 1880, and the present ejectment was brought January 3, 1881, and was tried on or prior to the fourteenth day of October, 1881.

If the demurrer of the plaintiff had been addressed to a separate count or defense in the answer, which alleged the facts above mentioned, we would not reverse the judgment because of the order sustaining the demurrer, since the facts might have been proved under the denials. But the demurrer is to "all of defendant's amended answer which occurs after line four, page two." The amended answer in the transcript is not numbered as to lines or pages. A demurrer must be directed to the whole of a pleading, or to a particular and separate count, or statement of a cause of action or defense.

The verdict was: "We, the jury in the above-entitled cause, find for plaintiff in the sum of \$500." Even if it should be conceded that the verdict passed upon the issues made by the pleadings, the judgment was erroneous and must be reversed. The judgment was: "Wherefore, * * * it is ordered, adjudged, and decreed that said plaintiff do have and recover from said defendant the sum of five hundred dollars damages, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of \$90.45."

This is no adjudication of the plaintiff's right of possession, or with reference to the ouster, or as to defendant's alleged withholding of the possession.

The verdict and judgment for \$500 were intended to be either for "rents and profits," or for "damages for withholding." The plaintiff was authorized to unite a claim to recover specific real property with a claim for damages for withholding thereof, and for rents and profits of the same. Code Civil Proc. 427. Whatever may be the difference between the two claims last mentioned, they are to be treated as in nature of an alleged *trespass for mesne profits*, which can be recovered only after or contemporaneously with a judgment for recovery of the possession of the demanded premises. When united with the ejectment, judgment for such damages can be rendered only when there is also a judgment for recovery of the possession.

Judgment reversed and cause remanded for a new trial.

We concur: McKEE, J.; ROSS, J.

(65 Cal. 153)

SCHLUTER v. HARVEY and others. (No. 8,999.)

Filed April 29, 1884.

The cancellation of a pre-existing debt is such a consideration as will constitute a vendee a purchaser in good faith and for a valuable consideration.

Where an attempt was made to plead facts showing a purchase for a valuable consideration, and no objection was taken thereto by demurrer or otherwise, nor any objection made to evidence tending to prove such facts, the insufficiency thereof cannot be taken advantage of on appeal.

Where conflicting claims for rent are made, the tenant may institute an action of interpleader to compel a determination of the respective rights of the claimants to such rent, and in such action the court has jurisdiction to determine the ultimate rights of the respective parties.

Department 1. Appeal from the superior court of Tehama county.

Schluter, the plaintiff in this action, leased of Muth, one of the defendants, a piece of farming land for a term of years, and by the terms of the lease, for the purpose of securing payment of the rent, agreed to execute to the lessee, each year, in advance, a note with approved security. Plaintiff occupied the land for several years, and in the mean time Muth assigned said lease to Henry Baumgarten, and subsequently thereto sold the leased premises to the defendant Harvey. As the time approached for the execution of the note, next subsequent to such assignment and sale, both said Baumgarten and said Harvey claimed that the execution of the same should be to himself. Schluter, to secure himself, brought this action of intervention against said parties to compel a determination of their conflicting claims to such rent. On the hearing the note was deposited in court and the intervention decreed. Subsequently, on the trial of the rights of the parties, each filed papers and introduced evidence to establish

his claim, no objection being interposed by either to the matters offered by the other. Judgment was rendered for defendant Harvey, and from this judgment Baumgarten appealed.

Chipman & Garter, for appellant.

J. F. Ellison, for respondent.

By THE COURT. 1. It is urged by appellant that the respondent cannot claim to be a purchaser in good faith and for a valuable consideration, because the cancellation of a pre-existing indebtedness is not a valuable consideration, within the meaning of section 1214 of the Civil Code. But it is the law of this state that such pre-existing debt is a valuable consideration. *Frøy v. Clifford*, 44 Cal. 335.

2. It is further insisted that the facts showing respondent to be a purchaser for a valuable consideration were not sufficiently pleaded by him. But there was an attempt to plead them, to which no objection was taken by demurrer or otherwise in the court below, nor was any objection made to the evidence of respondent tending to prove that he was a purchaser *bona fide* and for a valuable consideration.

3. There was evidence to sustain a finding that respondent had no actual notice of the grant to appellant.

4. It is claimed by appellant that the law of this state does not authorize the practice pursued or judgment rendered in this proceeding. In our opinion the action was authorized, and the proceeding accords with section 386 of the Code of Civil Procedure.

Judgment and order affirmed.

On an appeal by a defendant to the superior court from a judgment of a justice of the peace convicting him of battery, the same effect will be given to a dismissal on appeal, though there be no certificate of probable cause, if the justice, sheriff, and defendant treat the appeal as staying execution, as would be given if there had been such certificate of probable cause.

Department 2. Application for a writ of *habeas corpus*.

The petitioner herein was convicted of battery before a justice of the peace and sentenced to imprisonment for 50 days, and in pursuance thereof was imprisoned. The petitioner filed a notice of appeal, was admitted to bail, and released. No certificate of probable cause was filed. The appeal was subsequently dismissed and the petitioner taken into custody in execution of the sentence. There-

upon he made application to this court, on *habeas corpus*, to be released from custody.

L. J. Maddox, for petitioner.

By THE COURT. If giving notice of appeal and filing a bond would have stayed execution of sentence pending the appeal, it is sufficiently clear that on the dismissal of the appeal the petitioner herein might have been recommitted to prison. This is not disputed; but it is claimed that the appeal did not stay execution because there was no "certificate of probable cause," such as the Code requires in order to have the appeal operate as a stay. The appeal, however, was duly taken, and the justice, sheriff, and petitioner treated it as a stay of execution during its pendency. We think, under such circumstances, the same effect should be given to the dismissal of the appeal as would be given to it if there had been a certificate of probable cause.

Application denied and petitioner remanded.

65 Cal. 193

SANTA CRUZ R. Co. v. SPRECKLES. (No. 7,453.)

Filed April 30, 1884.

Corporations organized under the laws of the state have power to levy and collect assessments on capital stock for which the subscription price has been fully paid.

Where money is advanced to a corporation by a director, when the corporation is in debt and unable to obtain money from other sources, and such money is received and made use of in the business of the corporation, it will be liable to such director for the repayment thereof.

In bank. Appeal from the superior court of Santa Cruz county.

C. B. Younger, for appellant.

Jarboe & Harrison and *Mr. Craig*, for respondent.

Ross, J. The important question in this case is, to what extent corporations organized and existing under the laws of this state may levy and collect assessments. On the part of the respondent it is contended that no assessment can be levied upon any stock for which the subscription price has been fully paid. The matter of assessments is regulated by our statute, and the question is therefore to be determined by its provisions. Section 331 of the Civil Code provides:

"The directors of any corporation formed or existing under the laws of the state, after one-fourth of its capital stock has been subscribed, may, for the

purpose of paying expenses, conducting business, or paying debts, levy and collect assessments, upon the subscribed capital stock thereof, in the manner and form and to the extent provided herein."

From this section these things at least are clear: (1) That no assessment for any purpose can be levied until at least one-fourth of the capital stock of the corporation has been subscribed; (2) that assessments may be levied in the manner and form and to the extent provided by the statute for the purpose of paying the expenses, conducting the business, or paying the debts of the corporation; and (3) that the assessment authorized to be levied shall be levied only upon the subscribed capital stock.

The authority thus conferred on the directors of any corporation formed or existing under the laws of this state to levy and collect assessments for the purposes stated, is thus limited by the next section:

"Sec. 332. No one assessment must exceed ten per cent. of the amount of the capital stock named in the articles of incorporation, except in the cases in this section otherwise provided for, as follows:

"(1) If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities or to satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital stock; or if a less amount is sufficient, then it may be for such a percentage as will raise that amount.

"(2) The directors of railroad corporations may assess the capital stock in installments of not more than ten per cent. per month, unless in the articles of incorporation it is otherwise provided.

"(3) The directors of fire or marine insurance corporations may assess such a percentage of the capital stock as they deem proper."

It is further limited by section 333, which reads:

"Sec. 333. No assessment must be levied while any portion of a previous one remains unpaid, unless:

"(1) The power of the corporation has been exercised in accordance with the provisions of this article for the purpose of collecting such previous assessment.

"(2) The collection of the previous assessment has been enjoined; or,

"(3) The assessment falls within the provisions of either the first, second, or third subdivision of section 332."

We perceive, therefore, but two limitations to the power conferred by section 331,—the first being that no *one* assessment must exceed 10 per cent. of the amount of the capital stock *named in the articles of incorporation*; and the second, that no assessment must be levied while any portion of a previous one remains unpaid. But to each of these *limitations* certain exceptions are made. One of the exceptions to the first limitation is that if the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities or to satisfy the claims of its creditors, one assessment may be for the full amount unpaid upon the capital stock, even though it exceed 10 per cent. of the amount of the capital stock named in the articles of incorporation; or if a less amount is sufficient, then it may

be for such a percentage as will raise that amount. And one of the exceptions to the second limitation, which prohibits the levy of any assessment while a portion of a previous one remains unpaid, is when the previous assessment "falls within the provisions of either the first, second, or third subdivision of section 332." In other words, when the previous assessment falls within the provisions of either the first, second, or third subdivision of section 332, another assessment *may be levied* while the previous one remains unpaid.

Now, the first subdivision of section 332 in terms declares that if the whole capital has not been paid up, and the corporation is unable to meet its liabilities or to satisfy the claims of its creditors, the assessment may be for the *full amount unpaid upon the capital stock*. Of course, when such an assessment is collected, the stock upon which it is levied becomes fully paid for; yet, according to section 333, another assessment may nevertheless be levied. And the reason for the rule thus prescribed by the legislature seems plain; for one of the purposes for which the directors of a corporation are, by section 331, authorized to levy an assessment, is the conducting of the business of the corporation. And when the full amount unpaid upon the subscribed capital stock is required to meet the liabilities of the corporation, if the business is to be further conducted, it would seem very reasonable to authorize another assessment. So, too, does it seem reasonable that other assessments should be authorized, when, for instance, the assessment which, by the first subdivision of section 332 is authorized to be levied for the full amount unpaid upon the capital stock subscribed, is insufficient to satisfy the claims of the creditors of the corporation. But, whether reasonable or unreasonable, the law is so written, as we understand it.

Nor is it easy to believe that, had the legislature intended by the provisions of the Code in question to authorize assessments only to the extent of the par value of the stock subscribed for,—in other words, to provide only for the calling in of the sums subscribed,—it would not have expressed that intention in appropriate language. It would have been an easy matter to have done so, and, as we shall presently see, when the Codes were adopted there was standing upon the statute books an old act providing for that very thing. "There are two classes of assessments," says Potter, Corp. vol. 1, p. 323, "made by corporations or by the directors thereof, one of which is more properly distinguished as 'calls' made upon the subscriptions for shares within the amount of the unpaid sums upon the number of shares subscribed; the other, an assessment made upon the corporators, not merely as a part of their subscriptions, but to raise a sum of money beyond the amount of subscription for the use of the corporation to sustain its existence, to carry into use its corporate powers and to enable it to exercise its corporate duties." The power to call in the par value of the stock actually subscribed and agreed to be taken was a power incident to the corporation at common law, and the subscriber

was liable to an action therefor. But, by the common law, the stock of the subscriber could not be forfeited or sold for the amount of the assessment levied for the unpaid portion of the subscription price. To authorize a sale of the stock even for that purpose statutory authority was necessary. Accordingly, the legislature of this state, by the act approved April 14, 1853, (Hittell, art. 932 *et seq.*) empowered the trustees "to call in and demand from the stockholders the sums by them subscribed, at such times and in such payments of installments as they may deem proper." Section 10. Notice of each assessment was required to be given in a prescribed way, and provision was then made for the sale of the stock of such of the stockholders as should make default in the payment of the assessments upon the shares held by them. But in the year 1864 the legislature went further, and by act approved April 4, 1864, (St. 1863-64, p. 402,) provided that "the trustees of any corporation formed under the general laws of this state shall have power to levy and collect, for the purpose of paying the proper and legal expenses of such corporation, assessments upon the capital stock thereof, in the manner and form and to the extent hereinafter provided, and not otherwise." The next section contained the *limitations*, and reads:

"No assessments shall exceed five per cent. of the capital stock of the corporation, and none shall be levied while any portion of any previous assessment shall remain unpaid or uncollected, except in cases where all the powers of the corporation shall have been exercised in accordance with the terms of this act for the purpose of collecting such previous assessment, and except, also, the collection of a previous assessment against one or more stockholders restrained by injunction or otherwise, in which case further assesment may be levied and collected according to this act."

Subsequent sections of the act provided for notice, and for a sale of the stock in default of payment of the assessment.

This act was superseded by that of March 26, 1866, (St. 1865-66, p. 458,) but in the particulars in which we are considering the act of 1864 was similar to it. The act of 1864 was under consideration by the supreme court of this state in the case of *Sullivan v. Triunfo Mining Co.* 39 Cal. 465, and it was there held that it was, as it purported to be, applicable to all corporations "formed under the general laws of this state." In that case the court did not pass upon the question whether the provisions of the act were applicable to assessments for subscriptions to the capital stock, but it treated the assessment then in question as having been levied upon fully paid up stock, and it *sustained the assessment*. The court said:

"We express no opinion as to whether the provisions of the act are applicable to calls or assessments for subscription to the capital stock. The question does not arise in this case, for we infer from the complaint that the stock was issued in the usual mode in mining corporations; that is, the stock was issued to the owners of the mine in proportion to their several interests therein."

We have no doubt of the correctness of the construction thus put in the year 1870 upon the act of April 4, 1864; but, whether right or wrong, it is too late now, after the lapse of 13 years, for the court to change it.

We know, then, that the legislature did first provide only for the calling in by assessment of the full amount of the subscribed stock, and for the sale of the stock, after notice, in default of the payment of the subscription price. We know, also, that the legislature next went further and provided for assessments, for certain purposes and within certain limits, upon stock which had been fully paid for, and that thus the law stood when the Codes were adopted. If, in enacting the Codes, the legislature had intended to return to the rule prevailing in this state prior to the passage of the act of April 4, 1864, and to provide for assessments only for the amount unpaid upon the capital stock, would it not have employed some such language as it had previously employed when it had that purpose in view, and have empowered the trustees, as it did by the act of April 14, 1853, "to call in and demand from the stockholders the sums by them subscribed?" Some such language as that would so easily and so naturally have expressed that intent that any substantial departure from it naturally suggests the inquiry whether it did not intend something by the change. And when we find, as we do by comparing the respective provisions, that the legislature, in enacting the Codes, adopted substantially and almost literally the very language employed in the acts of 1864 and 1866,—language which this court more than 13 years ago decided authorized assessments upon stock that had been fully paid for,—and also made specific provision in regard to the assessment of the sums actually subscribed, the conclusion is to our minds irresistible, that, in enacting the sections of the Code in question, it not only did, but clearly intended to, authorize, for the purposes and subject to the limitations prescribed, assessments upon stock fully paid for, as well as assessments for the amount unpaid thereon. Indeed, the sections of the Code as first enacted were but a compilation, with certain modifications and alterations, of the pre-existing statutes on the subject. This is further shown by the provisions of section 332 in relation to railroad and fire and insurance corporations, which were taken from the pre-existing statutes in relation to the same subjects. The change made in the Code by the amendment of July 1, 1874, does not alter the case. It has already been referred to. Since the amendment no assessment can be levied for any purpose until after one-fourth of the capital stock has been subscribed; and now it is only upon the subscribed capital stock that any assessment at all can be levied. In other respects the limitations and provisions remain as before.

It is hardly necessary to add that with the policy of the law in question we have nothing to do.

With respect to the indebtedness of the corporation at the time of the levy of the assessment in question, it is sufficient to say that even if it be conceded that, under the circumstances set forth in the agreed statement of facts, a portion of the indebtedness to Hihn is invalid, we think there can be no question as to the validity of the item of cash advanced by him to the corporation; and this, added to the other indebtedness of the corporation, is more than the aggregate of the assessment. The money was advanced to and received by the corporation at a time when it was out of money and in debt, and when it was unable to obtain money from any other source than from Hihn. Where a director under such circumstances advances the corporation the needed money, which it receives and uses, there surely would be no justice, and we think no law, in holding that the corporation could not repay the amount. The authorities cited by respondent do not sustain him, and there are abundant authorities to the contrary. We cite *Seeley v. San Jose Independent Mill & L. Co.* 59 Cal. 22, and *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587.

As the facts were agreed to by the respective parties, it is useless to order a new trial.

Judgment reversed and case remanded, with directions to the court below to enter judgment for the plaintiff on the findings.

SHARPSTEIN, J. I concur.

MORRISON, C. J. I concur in the judgment.

McKINSTRY, J. I concur in the judgment, and in what is said by Mr. Justice Ross with respect to the indebtedness of the corporation when the assessment was levied.

With respect to the power of the corporation to levy the assessment, even construing section 332 of the Civil Code as containing limitations upon the power conferred by section 331, yet the assessment in question was legal, inasmuch as it and the previous assessments did not amount, in the aggregate, to "the amount of the capital stock named in the articles of incorporation." The subscribed capital stock may be assessed "to the extent" provided in the sections of the Code. Civil Code, 331.

By section 332 it is provided that no one assessment must exceed 10 per cent. of the amount of the capital stock named in the articles of incorporation, with certain exceptions. It seems very plain that the amount of "capital stock" named in the exceptions is the amount of capital stock mentioned in the first part of the section,—the amount of capital stock "named in the articles of incorporation." The argument of the respondent would lead us to the conclusion that section 332 does not mean what it distinctly declares, and that assessments are ordinarily to be graduated by reference, not to the amount of cap-

ital stock in the articles of incorporation, but by reference to the amount *subscribed*. Section 332 certainly limits the amount of any one assessment. But, if it be treated as limiting the whole amount which may be collected by assessment, still the amount of assessments may be equal to the amount of the capital stock named in the articles. If a corporation shall choose to proceed to business after less than all of its stock is subscribed for, it may do so; but, in such case, those who have subscribed are subject to assessments to the same amount as if all the stock were subscribed for. There are many reasons why the legislature may have imposed such burden upon the subscribed stock.

We dissent: MYRICK, J.; THORNTON, J.

(65 Cal. 160)

WILLIAMS v. BOARD OF SUPERVISORS. (No. 9,186.)

Filed April 29, 1884.

Certiorari as a remedy is available only for the review of acts of a judicial nature. An act of a board of supervisors creating a swamp-land reclamation district is an act of legislation in exercise of the taxing or police power, and not reviewable on *certiorari*.

Department 1. Appeal from the superior court of Sacramento county.

Grove L. Johnson, for appellants.

Williams & Gordon, for respondent.

By THE COURT. The order of a board of supervisors, creating a district for the reclamation of swamp land, is an act of legislation, in the exercise of the taxing or police power of the state, which is not reviewable upon *certiorari*. *Bixler v. County of Sacramento*, 59 Cal. 700. The writ of *certiorari* is, as a remedy, only available for the review of an act judicial in its character.

Judgment reversed and cause remanded.

(65 Cal. 183)

CONNOR v. STANLEY, Adm'r, etc. (No. 9,241.)

Filed April 30, 1884.

Where defendant's intestate, in consideration of the promise of plaintiff, an unmarried woman, to marry him, agreed to give her certain bonds then in his possession, at or before the time of marriage, as her separate property, such agreement constituted an antenuptial settlement; and the refusal, after reasonable time, of such intestate to marry plaintiff, she being at all times ready and willing to fulfill the same, does not avoid the contract, but plaintiff is entitled to such bonds as her own.

Department 1. Appeal from the superior court of Sacramento county.

George Cadwalader, for appellant.

Freeman & Bates, for respondent.

Ross, J. On the twenty-first day of June, 1882, plaintiff and the defendant's intestate—William Jarvis—executed the following instrument in writing:

"This indenture, made and entered into this twenty-first day of June, 1882, by and between William Jarvis, of the county of Sacramento, state of California, party of the first part, and Mrs. J. L. Conner, of the city and county of San Francisco, state of California, party of the second part:

"Witnesseth, that whereas, the party of the first part and the party of the second part have agreed, and do hereby mutually agree, to marry each other; and that in consideration thereof, and of the mutual affection existing between them, the party of the first part grants and gives to the said party of the second part ten thousand (10,000) dollars' worth of the bonds of the Natoma Water & Mining Company, a corporation duly organized under the laws of the state of California, being twenty bonds of five hundred (500) dollars each, made payable to bearer, now in the possession of the party of the first part, all of which he promises to deliver to her, the party of the second part, on or before the day of their said marriage, to be and become her own absolute property in her own name as her separate estate.

"It is further agreed that one-half of the interest on said bonds, as the same becomes due and payable, from time to time, shall be paid to the party of the first part, and the other half thereof shall be paid to the party of the second part.

"And the party of the second part hereby agrees to keep and perform her agreement herein in good faith; and they hereby mutually agree to marry each other within a reasonable time hereafter.

"In witness whereof, the parties have hereunto set their hands and seals the year and day first above written.

"WM. JARVIS. [Seal.]

"MRS. J. L. CONNOR. [Seal.]

"Signed in the presence of P. B. NAGLE."

As the case is presented it appears that at the time of the execution of the contract both of the contracting parties were unmarried; that the plaintiff, in accordance with the obligations imposed

on her thereby, remained unmarried, and was, from the time of the making of the contract to the time of the death of Jarvis, which occurred on the eighth of September, 1882, always ready and willing to marry him, of which he was constantly advised; but that he, in disregard of the obligation imposed upon him by the contract, refused to marry the plaintiff, and continued such refusal to the time of his death. After the death of Jarvis an administrator of his estate was appointed, to whom the plaintiff presented a verified claim based on the contract, which claim was rejected by the administrator. The action is to recover of the administrator the value of the bonds and one-half of the accrued interest thereon. The interpretation of the contract adopted by the court below was that on the part of Jarvis there was a mere promise to deliver the bonds upon the marriage of the parties within a reasonable time. "The happening of a future event, viz., the marriage, was," said the court, "a condition precedent to the vesting of the bonds in plaintiff." We cannot so construe the contract. The language is: "The party of the first part grants and gives to the party of the second part" certain described bonds then in the possession of the party of the first part, "all of which he promises to deliver to her, the party of the second part, on or before the day of their said marriage, to be and become her own absolute property in her own name as her separate estate." The bonds which he granted and gave he promised to deliver to the plaintiff on or *before* the day of their marriage; and the consideration for this was the affection existing between the parties and their mutual agreement to marry. It was nothing more nor less than an antenuptial settlement, the consequences of which could not be avoided by Jarvis' refusal to consummate his agreement to marry the plaintiff,—she being at all times ready and willing to marry him, and no reason for his refusal appearing. It was not for her to seek him, but it was his duty to have sought her in marriage within a reasonable time after the engagement. "The modesty of the sex is considered by the common law," said Lord Coke.

Jarvis having without excuse refused to consummate his engagement, and the plaintiff having in all things complied with the obligations imposed on her by the contract, she is legally and justly entitled to receive the consideration for which she plighted her troth. That the promise and conduct of the plaintiff constituted adequate and valuable consideration for the settlement does not admit of doubt. The circumstance that the marriage was not in fact consummated is immaterial. It was not consummated because of the fault of Jarvis, and it is a maxim of the law that no man shall take advantage of his own wrong. Besides, with respect to the sufficiency and value of the consideration, there does not appear to be any real and substantial distinction between a marriage formally solemnized and a binding and obligatory agreement, fairly made, to form such connection and enter into that relation. "All the consequences of a

legal obligation," as said by the court in *Smith v. Allen*, 5 Allen, 458, "accompany such an agreement. The law enforces its performance by affording an effectual remedy against the party who shall, without legal excuse, fail to fulfill it. But a contract of this kind is not to be regarded as a valuable consideration merely because damages commensurate with the injury may be recovered of the party who inexcusably refuses to fulfill it. It is peculiar in its character, and has other effects and consequences attending it. It essentially changes the rights, duties, and privileges of the parties. They cannot, while it exists, without a violation of good faith, as well as of the material obligations to which it subjects them, negotiate a contract for such an alliance with any other person. A woman who has voluntarily made such an agreement cannot without indelicacy, and so not without exposing herself to unfavorable observation, and to some loss of public favor and respect, seek elsewhere, except for good and substantial reasons, withdrawing from the engagement by which she has bound herself, for preferment in marriage; and thus her promise and agreement to marry a particular person essentially change her condition in life. They materially affect not only her opportunities but her right to attempt in that way to improve them. A legal contract and promise made in good faith to marry another must, therefore, like an actual marriage, be deemed to be a valuable consideration for the conveyance of an estate."

Judgment reversed and cause remanded, with directions to the court below to overrule the demurrer to the amended complaint, with leave to the defendant to answer.

We concur: McKINSTRY, J.; McKEE, J.

65 Cal. 174

PEOPLE v. MESS. (No. 10,937.)

Filed April 30, 1884.

An order of court fixing the time of sentence, after conviction of felony, is not an appealable order, and an exception taken to such order, because it provided for a sentence before the time provided by law, is not reviewable in the supreme court.

Department 1. Appeal from the superior court of the city and county of San Francisco.

Clara S. Foltz, for appellant.

The Attorney General, for respondent.

Ross, J. A verdict finding the defendant guilty of the crime of forgery was returned and entered in the superior court of the city

and county of San Francisco on the twenty-fifth day of October, 1883. The court thereupon appointed October 27, 1883, as the time for pronouncing the sentence of the law, and on the said twenty-seventh day of October sentenced the defendant to imprisonment in the state prison at San Quentin for the term of seven years. It is claimed by counsel for appellant that the sentence so imposed was contrary to law, in that two days had not elapsed between the rendition of the verdict and the pronouncing of sentence.

Section 1191 of the Penal Code reads:

"After a plea or verdict of guilty, or after a verdict against the defendant on the plea of a former conviction or acquittal, if the judgment be not arrested or a new trial granted, the court must appoint a time for pronouncing judgment, which, in cases of felony, must be at least two days after the verdict, if the court intend to remain in session so long; but if not, then at as remote a time as can reasonably be allowed."

The intention of the "court" is known to the judge only, and there is no mode by which we can say he did not intend to remain in session "so long." It is, perhaps, for this reason that no exception is allowed by statute to the order fixing the time for sentence. Penal Code, §§ 1172, 1173. No such exception being allowed, the order is not reviewable here. It should be added, however, that there was no objection on the part of the defendant to the shortness of time, when, on the twenty-fifth of October, the court below appointed the twenty-seventh for pronouncing sentence; nor was there any such objection made when on the day appointed the defendant was called for sentence. Had defendant made it appear to the court that the time appointed was less than two days after the rendition of the verdict, and the court intended to remain in session so long, the time for pronouncing sentence would doubtless have been fixed at least two days after the rendition of the verdict.

Our conclusion is that the judgment of October 27, 1883, is a valid judgment, and that the defendant is legally in custody under it. It results that the proceedings subsequently taken in the superior court, looking to a resentence of the defendant, were void.

Judgment of October 27, 1883, affirmed, and judgment of November 13, 1883, reversed.

We concur: MCKEE, J.; MCKINSTRY, J.

CRUZ v. COUNTY OF LOS ANGELES. (No. 9,246.)

Filed April, 1884.

The validity of the county government act of the state of California, passed March, 1883, affirmed, on the authority of *Logan v. Solano Co.*, ante, 463.

In bank. Appeal from the superior court of Los Angeles county. The facts of this case and questions involved are precisely similar to those in the case of *Logan v. Solano Co.*, ante, 463.

S. M. White, for appellant.

Smith, Brown & Hutton, for respondent.

By THE COURT. On the authority of *Logan v. Solano Co.*, ante, 463, the judgment is affirmed.

I dissent: THORNTON, J.

2 Cal. Unrep. 301

ROYON v. GUILLEE and others. (No. 8,275.)

Filed April 30, 1884.

In an action of ejectment, where the plaintiff gives in evidence a judgment roll showing a judgment in his favor and against defendants, an execution duly issued thereon, a sale of the demanded premises to plaintiff, an attachment and sheriff's return showing a levy which has never been released, and evidence of possession subsequent to the levy and prior to the judgment in the first suit, and defendants offer no evidence, a finding thereon for the plaintiff is amply supported by the evidence, and judgment must be affirmed.

Department 2. Appeal from the superior court of Alameda county.

Wm. M. Pierson, for appellants.

R. M. Swain, for respondent.

By THE COURT. In this action (ejectment) the complaint is in the usual form, and the answer denies that the plaintiff was seized in fee or in any other estate, or entitled to the possession of the premises; or that the defendants wrongfully withhold the possession from him, or that he was damaged in any sum whatever thereby. On the trial the plaintiff introduced in evidence the judgment roll, showing a judgment in favor of plaintiff and against defendants Nicholas and

Louise Aimee Guillee, an execution duly issued thereon, a sale of the demanded premises to plaintiff, also a writ of attachment, and the sheriff's return showing a levy thereunder on March 19, 1877, which was never released. It was then shown that subsequent to the levy of the attachment and prior to the judgment in the first suit, defendants were in possession of the demanded premises. Defendants offered no evidence. The findings which were in favor of plaintiff are attacked on the ground of insufficiency of the evidence to support them. We think they are amply supported by the evidence, and as this is the only ground relied on for a reversal of the judgment it must be affirmed.

Judgment and order affirmed.

65 Cal. 154

Ex parte KELLY. (No. 10,973.)

Filed April 28, 1884.

Where a person is convicted of battery before a justice of the peace, and a fine is imposed as punishment, with a substituted imprisonment therefor in case of non-payment, the statute does not authorize such justice to direct that such prisoner, while so imprisoned, shall perform labor in the streets or other public works. Such judgment, being a unit, is void if any portion of it is without jurisdiction, and will entitle defendant to a discharge on *habeas corpus*. The supreme court cannot excise the void portion from the judgment and order what remains to be carried into execution.

In bank. Application for a writ of *habeas corpus*.

J. F. Godfrey, for petitioner.

S. M. White, contra.

THORNTON, J. Application for writ of *habeas corpus*. The petitioner was accused and convicted of a battery, and the court rendered the following judgment:

"In the Court of the Justice of the Peace for the Township of Los Angeles, in the County of Los Angeles, State of California. R. A. Ling, J. P.

"The People of the State of California to the Sheriff of the County of Los Angeles, greeting:

"Whereas, John Kelly has this day been convicted before me, R. A. Ling, justice of the peace for the township of Los Angeles, county of Los Angeles, and state of California, of the crime of battery, committed in said Los Angeles township, on or about the third day of April, A. D. 1884. And whereas, upon such conviction, I did consider and adjudge that for said offense the said John Kelly be fined in the sum of six hundred and fifty dollars, or be imprisoned in the county jail of said Los Angeles county in the proportion of one day's imprisonment for every dollar of the fine until the fine be satisfied, not exceeding six hundred and fifty days, and the defendant to be discharged on

payment of such portion of said fine not satisfied by imprisonment at rate above specified. And whereas, the said John Kelly, although requested to pay said fine, has not paid the same, these are therefore to command you, the said sheriff, to take and receive the said John Kelly and imprison him in the county jail of Los Angeles county in the proportion of one day's imprisonment for every dollar of the fine until said fine be satisfied, not exceeding 650 days, and the defendant to be discharged on payment of such portion of said fine not satisfied by imprisonment at the rate above prescribed. And the said defendant, while so imprisoned, perform labor on the streets or other public works of the city of Los Angeles.

"Given under my hand at the township of Los Angeles, in the county of Los Angeles, this fourth day of April, A. D. 1884.

"R. A. LING,

"Justice of the Peace in and for Los Angeles township and county, and state of California."

Battery is a misdemeanor, and "is punishable by fine not exceeding \$1,000, or by imprisonment in the county jail not exceeding six months, or by both." Penal Code, § 243.

It was manifestly not the intention of the justice of the peace who tried the cause to impose both fine and imprisonment as a penalty. If that had been his intention he would not have provided in the judgment for the discharge of the defendant on payment of the fine, or such portion of it as remained unsatisfied, after crediting the defendant with that portion of the imprisonment suffered, at the rate of one dollar a day.

It was clearly the intent to impose a penalty or a fine, and, in case it was not paid, imprisonment until the fine was satisfied at the rate indicated in the judgment. This is justified by section 1446 of the Penal Code, which reads as follows: "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied, in the proportion of one day's imprisonment for every dollar of the fine." This section of the statute certainly allowed a substituted mode of paying the fine, and it may well be styled a substituted punishment in case of non-payment, qualified as to payment and discharge of the defendant as in the judgment entered in this case. But this statute nowhere allows any addition to this substituted mode of payment. We look in vain to find any authority in any tribunal, in the Penal Code, or any other Codes, to annex to this substitution of incarceration for coin any other punishment. We find no power in the justice to add, as is done by the judgment, that defendant, while so imprisoned, perform labor on the streets or other public works of the city of Los Angeles. This portion of the judgment is clearly beyond and outside the jurisdiction of the tribunal which rendered it.

Now, the judgment is a unit, and if one portion of it is without the jurisdiction of the justice the judgment is void. We see no authority in this court, on this proceeding, to hold a portion of a judgment surplusage, because not authorized by law, to exseind such portion from the judgment and order what remains to be carried into

execution. The judgment must be passed on as a whole, and if any material portion of it is in excess of the jurisdiction of the court, the judgment is void. Further, what authority has this court to say, on an application for a discharge under the writ of *habeas corpus*, that the judgment of the court is any other than the judgment rendered? If we have authority to excise one portion, what portion shall it be? What portion shall be held to be the judgment of the justice and what portion not? The judgment entry comes before us as one thing, —one portion as well attested as the other, —and as such we must construe it; and if one portion of the judgment is without authority of law, we have no power under this writ, whatever may be the power of the court on an appeal, to excise a portion of the judgment and hold what remains to be the judgment of the court.

It follows from what has been said above that the petitioner is entitled to be discharged.

On the argument our attention was called to the sixth section of the act of 1872. The act is entitled "An act to amend the charter of the city of Los Angeles," and was approved February 20, 1872. See Acts 1871-72, p. 129. The sixth section has no reference to the case of a judgment imposing the penalty of a fine, and imprisonment until the fine be satisfied, at a certain rate per day. It only has reference to a case where the penalty is solitary confinement in the county jail.

It was contended before us that the section above mentioned was sometime ago repealed. As to this we say nothing. It is unnecessary to pass on this point.

The prisoner is entitled to his discharge, and it is so ordered.

We concur: SHARPSTEIN, J.; MCKINSTRY, J.; MCKEE, J.

SUPREME COURT OF CALIFORNIA.

2 Cal. Unrep. 302

ELLIS v. BENNET and others. (No. 9,217.)

Filed May 14, 1884.

An appeal will be ineffectual where the notice of appeal was not signed by the attorney of record, or of counsel for appellant, or where no proof is shown of service of the notice of appeal upon the respondent.

An order appealed from cannot be reviewed on a record which contained no copy of an undertaking on appeal, or showing that the same was filed, or that, instead thereof, a deposit in money had been made; no bill of exceptions; no showing what papers were used upon the hearing of the order to show cause upon which the order appealed from was made; and no certification of the transcript on appeal by the clerk of the court, or the attorneys in the cause. The certificates of the presiding judge and clerk, made after the service and filing of the notice of motion to dismiss the appeal, will not supply the defects in the transcript.

Department 1. Appeal from the superior court of the city and county of San Francisco.

M. G. Cobb and *Horace G. Platt*, for appellant.

Stanly, Sten'y & Hayes, for respondents.

MCKEE, J. This is an attempted appeal from an order made and entered May 29, 1883, restoring respondents to possession of a tract of land from which they had been dispossessed by the sheriff by the execution of a writ of possession which had been issued upon a judgment in favor of the plaintiff (who is the appellant) against one Thomas J. Currey, for the recovery of said land and costs. In the transcript which has been filed there is a copy of the notice of appeal, which is signed by attorneys, who, as appears by the recitals in the order appealed from, were not the attorneys of record or of counsel for the appellant; and it contains no proof of service of the notice upon the respondents, or either of them. Besides, it contains no copy of an undertaking on appeal, no showing that such an undertaking was filed at any time, or that, instead thereof, a deposit in money had been made. Code Civil Proc. §§ 940, 941. Moreover, it contains no bill of exceptions, and no showing what papers were used on the hearing of the order to show cause upon which the order appealed from was made. Id. § 951. Furthermore, it is not certified by the clerk of the court, or the attorneys in the case, as required by section 953, Id. Upon such a record the order appealed from cannot be reviewed. The certificates of the presiding judge and clerk, made after the service and filing of notice of motion to dismiss the appeal, did not supply the defects in the transcript. The appeal in itself was ineffectual,

because of the defective notice of appeal, and because the transcript contains no proof of its service.

The motion to dismiss must be sustained.

We concur: ROSS, J.; MCKINSTRY, J.

65 Cal. 193

SANTA CRUZ R. CO. v. SPRECKLES. (No. 7,453.)

Filed May 12, 1884.

For majority opinion, see *ante*, 661.

In bank.

THORNTON, J., *dissenting*. I dissent. I adhere to the opinion filed in this case on the thirtieth of June, 1882, and I desire to add to it what follows:

The limitation in the first subdivision of section 332, Civil Code, is not changed by the provisions of section 333 so as to allow a recovery here. The purpose of this latter section is to authorize an assessment when any portion of a previous assessment remained unpaid. Now, that is not the case here. It does not appear that there was any portion of any previous assessment remaining unpaid. The *casus legis* not appearing, it is the same, as far as regards the case under consideration, as if it did not exist. Conceding, then, that an assessment may be levied in cases of the subscribed capital stock to pay a portion of a previous assessment remaining unpaid, no such state of things appearing herein, the assessment sued on, as to this defendant, who has paid for his stock in full, is invalid. There is no reason to hold that the provisions of section 333, which constitute a limitation on section 332, enlarge in any way the provisions of the last-named section any further than conceded above.

I have examined with much care the case of *Sullivan v. Triunfo M. Co.*, reported in 39 Cal. 459. The question herein considered was not made in that case. Certainly it was not raised or discussed by counsel. No such objection as is here made to the validity of the assessment was made in that case. Nor do I think it was passed on by the court. The act of 1864, under which the assessment under consideration in the case cited was levied, has no provisions similar to those in section 332. The difference between the two systems, viz., that created by the act of 1864 and that created by the Civil Code, is plainly apparent. The court, in the *Sullivan Case*, held, substantially, that the act of 1864 repealed the act of 1853, and did away with all the limitations and restrictions in the act of 1853.

It left the power to levy assessments without limit, except the restriction on the power to levy one assessment when any portion of a previous assessment remained unpaid. The decision amounts to this only, that the power of assessment was not limited by the amount of the capital stock by the act of 1864. This may be admitted to be correct under the provisions of the act of 1864, because this act contains no such restrictions as are set forth in section 332, Civil Code, or the tenth section of the act of 1853, this last section having been repealed by the act of 1864.

To explain my meaning more fully: In the case cited the court remarked as follows: "We express no opinion as to whether the *provisions of the act* are applicable to calls or assessments for subscription to the capital stock. The question does not arise in this case, for we infer from the complaint that the stock was issued in the usual mode of mining corporations; that is, the stock was issued to the owners of the mine in proportion to their several interests therein." The point as to which the court expresses no opinion is this: whether the provisions of the act of 1864, in regard to assessments, include assessments for the subscribed capital stock. That act authorizes the "trustees of any corporation * * * to levy and collect assessments upon the capital stock thereof, for the purpose of paying the proper and legal expenses of such corporation." The question might arise whether the words "proper and legal expenses of such corporation" included the subscriptions to the capital stock. This is the question which, I understand, the court in the case referred to declined to express any opinion on. The remark following the statement that the question did not arise in the case may be interpreted to mean that the capital stock in that case was fully paid up for the reason given. Concede this to be the meaning, and it only amounts to this: that if the capital stock was fully paid, yet the act authorizes assessments for the purpose of paying the proper and legal expenses of the corporation; the power to levy and collect assessments having under this act no such limit as the full payment for the subscribed capital stock. This limit, in my opinion, is found in section 332, and is not in the act of 1864. I express no opinion as to the question discussed in this opinion, in regard to mining corporations. It is unnecessary to do so, and I therefore forbear to say anything in relation to such corporations.

I am still of opinion that the judgment of the court below is without error and should be affirmed.

We concur: McKEE, J.; MYRICK, J.

Cal.Rep. 1-4 P.—27

65 Cal. 227

ROUGH *v.* SIMMONS. (No. 9,117.)

Filed May 9, 1884.

In an action to determine the possession of a mining claim, under the United States Revised Statutes, a complaint which alleges the ownership and possession of the property by plaintiff, the adverse claim of defendant, and that such claim is without right, states facts sufficient to constitute a cause of action.

In bank. Appeal from the superior court of Siskiyou county.

W. H. H. Hart, for appellant.

Gillis & Edgerton, for respondent.

By THE COURT. The complaint alleges that plaintiff is the owner and in possession of the easterly 11.42 acres of the Colonel Limberger placer mine, and that defendant claims an interest or estate therein adverse to the plaintiff, which claim is without right, and that defendant has no estate, right, title, or interest in the said 11.42 acres, etc. A general demurrer to the complaint was sustained by the superior court. This was error.

Judgment reversed and cause remanded, with direction to the court below to overrule the defendant's demurrer to the complaint.

ROUGH v. BOOTH. (No. 9,116.)

Filed May 9, 1884.

On authority of *Rough v. Simmons*, ante, 804, judgment reversed.

In bank. Appeal from the superior court of Siskiyou county. The facts are the same as in the case of *Rough v. Simmons*, ante, 804.

W. H. H. Hart, for appellant.

Gillis & Edgerton, for respondent.

BY THE COURT. On authority of *Rough v. Simmons*, ante, 804, judgment reversed and cause remanded, with directions to the court below to overrule defendant's demurrer to the complaint.

(65 Cal. 236)

MOFFATT v. COOK. (No. 8,453.)

Filed May 13, 1884.

Courts have power, under Code Civil Proc. § 1054, to extend the time for preparing and serving the bill of exceptions 30 days, in addition to the 10 days allowed therefor by section 659 of the same Code.

Department 2. Appeal from the superior court of the city and county of San Francisco. Motion to dismiss appeal.

Mastick, Belcher & Mastick, for appellant.

John C. Burch, for respondent.

BY THE COURT. Motion to dismiss appeal of defendant from an order denying his motion for a new trial. The court did not exceed the power given to it by section 1054, Code Civil Proc., in extending the time of defendant to prepare and serve the bill of exceptions filed in this case 30 days, in addition to the 10 days for the preparing and serving such bill allowed by section 659 of same Code. See, also, section 650, Code Civil Proc.

Motion denied.

(65 Cal. 241)

CITY OF SAN JOSE *v.* REED and others. (No. 7,846.)

Filed May 14, 1884.

In an action by a city to condemn land for use as a public street, where the plaintiff alleges title to be in defendant, evidence of a dedication by him is inadmissible for the purpose of measuring damages, or for any purpose.

Where, in such an action, evidence was given as to the value of the land, the lowest estimate being \$2,700 and the highest \$5,400 and the jury gave defendants a verdict for one dollar for the lands taken, *held*, that the verdict was not sustained by the evidence.

Department 2. Appeal from the superior court of Santa Clara county.

Wm. Matthews, for appellants.

D. W. Herrington, for respondent.

MYRICK, J. This is an action to condemn a parcel of land to the use of plaintiff as a public street. The complaint contains an averment "that said defendants are the only owners or claimants of the premises hereinafter described and sought to be condemned." On the trial the court permitted the plaintiff to give evidence tending to show that the defendant E. P. Reed had dedicated the land to the public as a street, as affecting the question of damages or compensation. This was error. No question of dedication was involved in the pleadings for any purpose. If there had been a dedication, and defendants had unlawfully obstructed the street, an action of another character could have been maintained. Either the land had been dedicated, and was a public street, or the defendants were the owners. The plaintiff alleged the latter to be the fact. For the purposes of this action, then, it must stand on the allegation, and we must regard them as such. The jury gave the defendants a verdict of one dollar for the lands taken. By the testimony, the lowest estimate of value was \$2,700; the highest, \$5,400. The verdict was not sustained by the evidence; it was evidently based on the idea of a former dedication.

Judgment and order reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; SHARPSTEIN, J.

65 Cal. 243

MORGAN v. MENZIES and others. (No. 9,274.)

Filed May 14, 1884.

Where a demand is necessary to fix the liability of sureties to an undertaking, it is parcel of the contract, and must be made before the commencement of an action for the breach of the undertaking; and in the action itself it must be averred and proved. Such demand cannot be made after the commencement of the action, except as the basis of a new action.

In bank. Appeal from the superior court of the city and county of San Francisco.

Wm. H. Sharp, for appellant.

W. C. Burnett and *E. E. Haft*, for respondents.

MCKEE, J. On a former appeal in this case we held that no recovery could be had in the action out of which the case arises, because there was no averment and no proof that the claim of the plaintiff had been presented to the board of supervisors of the city and county of San Francisco, as required by the statute of 1863-64, pp. 152, 153, and payment demanded; and because the undertaking itself, upon which the action was founded, was in contravention of law, and void; therefore the judgment appealed from was reversed, and the cause remanded. 60 Cal. 341.

When the *remittitur* went down and was filed in the lower court, the plaintiff amended his complaint, and, subsequently, filed a supplemental complaint containing the averments that he had presented his claim to the board of supervisors of the city and county, and demanded payment thereof on the tenth of July, 1882, two years and six months after the commencement of the action. Upon these pleadings the action was again tried, and judgment was given for the defendants, from which the plaintiff appeals.

Where a demand is necessary to fix the liability of sureties to an undertaking, it is parcel of the contract, and it must be made before the commencement of an action for the breach of the undertaking; and in the action itself it must be averred and proved. It cannot be made after the commencement of the action, except as the basis of a new action.

With the exception of the averments of a demand in the supplemental complaint, the pleadings upon which the case was tried are, substantially, what they were on the former appeal, and the questions at issue are the same. The decision then rendered must therefore be accepted as the law of the case.

Judgment affirmed.

We concur: MCKINSTRY, J.; ROSS, J.; MYRICK, J.; SHARPSTEIN, J.; THORNTON, J.

65 Cal. 219

NEVADA BANK OF SAN FRANCISCO *v.* STEINMETZ, Treasurer, etc.
(No. 7,595.)

Filed May 6, 1884.

Where a motion for a new trial is pending, and a writ of error and bond for the removal of the cause to the supreme court of the United States are filed more than 60 days after the judgment is rendered, but within 60 days after the order denying the motion for a new trial, such writ and bond will operate as a *supersedeas*.

In bank. Motion for writ of mandate.

McAllister & Bergin, for plaintiff.

Skirm & Storey, for defendant.

MYRICK, J. This is a motion by the plaintiff that a writ of mandate issue according to the judgment of this court. On the seventeenth day of November, 1882, this court rendered judgment in favor of plaintiff that it was entitled to a writ of mandate as prayed for. A petition for rehearing was denied December 16, 1882. The defendant moved for a new trial, which was denied November 27, 1883. A writ of error for the removal of the cause to the supreme court of the United States was allowed and filed January 23, 1884, and, on the same day, a bond approved by the chief justice of this court was filed. It thus appears that the writ of error and bond were not filed within 60 days after the judgment awarding the writ of mandate, but were filed within 60 days after the order denying the motion for a new trial.

The point for determination is whether the writ of error and bond operates as a *supersedeas*. Section 1007, Rev. St. U. S., requires that the writ and bond, to operate as a *supersedeas*, must be lodged in the clerk's office, where the record remains, within 60 days after the rendering of the judgment complained of. We are of the opinion that, for the purposes of the present motion, the motion for a new trial operated as a postponement of the time for filing the writ of error and bond until the disposition of that motion, and, as they were filed within 60 days after such disposition, a stay of proceedings on the judgment was effected.

The motion is denied.

MORRISON, C. J., and MCKEE, J., concurred.

THORNTON, J. I concur in the order.

ROSS and SHARPSTEIN, JJ., *dissenting*. A *supersedeas* is a statutory remedy, and can only be obtained by a compliance with all the required conditions. By the express language of the act of congress,

in order to obtain such *supersedeas*, a copy of the writ of error must be lodged for the adverse party in the clerk's office, where the record remains, within 60 days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law. In the present case it is not claimed that this was done. Said the court, in *Sage v. Central R. Co.* 93 U. S. 417:

"Time is an essential element in the proceeding, and one which neither the court nor the judges can disregard. If a delay beyond the time limited occurs, the right to the remedy is gone, and the successful party holds his judgment or decree freed and discharged from this means of staying proceedings for its collection or enforcement."

The matter being regulated by the statutes of the United States, we are unable to see what the proceedings on motion for a new trial in the state court have to do with it. In our opinion the petitioner is entitled to the writ adjudged him.

(65 Cal. 223)

PEOPLE v. SWAFFORD. (No. 10,964.)

Filed May 8, 1884.

In the absence of evidence as to what took place when the lower court passed an order in a criminal case that all persons be excluded from the court-room except the judge, jurors, witnesses, and persons connected with the case, it will be presumed that the accused assented to such order.

Such an order is not a denial of the right to a "public trial," as guarantied by the constitution (article 1, § 13) to every person accused of crime.

Department 1. Appeal from judgment of the superior court for Tehama county, in favor of plaintiff.

Gale & Hitchcock, for appellant.

The Attorney General, for respondent.

BY THE COURT. It is contended by appellant that the court had no power to order that all persons be excluded from the court-room except the judge, jurors, witnesses, and persons connected with the case. The constitution of the state provides that every person accused of crime shall have the right to a public trial. Const. art. 1, § 13. *Non constat* but defendant, who was charged with abducting a chaste female under age, for purposes of prostitution, assented to or demanded the order.

It is said on behalf of appellant—*First*, it cannot be presumed that defendant waived a constitutional right by remaining silent; *second*, the right to a public trial cannot be waived, because the court below had no jurisdiction to try defendant otherwise than publicly.

As to the first point, there is no bill of exceptions in the transcript, and, in the absence of evidence as to what took place when the order was made, we cannot presume that defendant remained silent, but, on the contrary, in support of the action of the court below, must presume that defendant assented to the order, if his assent was necessary to its validity.

With respect to the second point, the order does not prove that defendant was denied a public trial. The word "public" is used in the clause of the constitution in opposition to secret. As said by Judge COOLEY, it is not meant that every person who sees fit shall, in all cases, be permitted to attend criminal trials. "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with, and not unjustly condemned; and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility, and to the importance of their functions; and the requirement is fairly observed, if, without partiality or favoritism, a reasonable portion of the public is suffered to attend, notwithstanding that those persons whose presence would be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether." Const. Lim. side p. 312.

Judgment affirmed.

65 Cal. 221

BROWN and others v. GREENE and others. (No. 9,241.)

Filed May 8, 1884

Where the notice of appeal from an order denying a new trial is filed more than 60 days after the order was made and entered, the appeal must be dismissed.

Where service of notice of appeal is made by mail, service is complete at the time of deposit in the post-office, and the undertaking must be filed within five days therefrom.

Section 1013 of the Code of Civil Procedure has no application when the question is as to the service of notice of appeal.

Department 1. Appeals from the superior court for Yolo county.

Flournoy, Mhoon & Thomas, for appellants.

McKune and Catlin, for respondents.

MCKINSTRY, J. This is a motion to dismiss appeals from the judgment, and from an order denying a motion for a new trial. The judgment was entered December 6, 1882, and the order denying a new trial, April 11, 1883. The notice of appeal was filed December 3, 1883, more than 60 days after the order was made and entered. The appeal from the order must be dismissed. Code Civil Proc. 939. A notice of appeal from the judgment was filed within one year after the entry of the judgment. But the transcript contains no evidence that a similar notice was served upon the adverse party or his attorney. Id. 940. At the foot of the notice of appeals are printed the words and figures, "Service admitted December 3, 1883;" but to them is subscribed neither the name of the adverse party nor that of his attorney. Even if we were authorized to supply the name of the attorney for the adverse party, the appeal must be dismissed, because the undertaking on appeal was not filed until the eleventh day of December, 1883, more than five days after service of the notice. It seems to us very plain that a written statement, "service admitted," signed by the attorneys of the respondent, would mean, "personal service admitted."

It is contended, however, that the service may have been by mail, (Code Civil Proc. 1012,) and that we should take notice that the attorneys for one of the parties reside in San Francisco, and the attorneys for the other party in Sacramento; that the distance between the two cities is 86 miles. Even if all this could be assumed, the admission of service as of the third of December, 1883, would be an admission that the service was made on that day. The service is complete at the time of the deposit of the "similar notice" in the post-office. Id. 1013. And to render an appeal effectual for any purpose, the undertaking on appeal must be filed within five days after service of the notice of appeal. Id. 940. On the other hand, if the service

were not complete until the expiration of eight days after the copy of notice of appeal was deposited in the post-office, the presumption would be that the eight days had expired on the third day of December, 1883, the date of the admission of service. But that portion of section 1013, which, in certain cases, extends the time one day for each twenty-five miles, has no application when the question is as to service of notice of *appeal*. After service of the notice of appeal by mail, which, as we have seen, is complete at the time of the deposit in the post-office, there is no given number of days within which the *adverse party* may exercise a right or do an act. The adverse party is the party on whom the service is made. There is no reason why the appellant should not file his undertaking on appeal within five days after he has deposited the notice of appeal in the post-office. *He* knows when it was deposited. The right of the adverse party to except to the sureties begins to run from the filing of the undertaking, not from service of the notice of appeal. *Id.* 948. Under section 1013 the party serving a notice can never be a party adverse to himself.

Appeals dismissed.

Ross and McKee, JJ., concurred.

65 Cal. 225

PEOPLE v. YOUNG. (No. 10,954.)

Filed May 8, 1884.

Where an information charges a burglary, in that defendant did feloniously * * * enter "the building, to-wit, the ticket-office of the Central Pacific Railroad Company, a corporation * * *, with intent then and there to commit larceny," the court may properly refuse to charge the jury that defendant could not be convicted unless he entered the building known as the ticket-office with intent to commit "*some felony*," since such instruction would imply that he could be convicted if he entered with intent to commit *any* felony.

One who enters with burglarious intent a room of a house, enters the house with such intent; and where such room is a "ticket-office," it may properly be described as "a building, to-wit, the ticket-office."

It is not error to give the definition of burglary laid down in section 459 of the Penal Code

In such an action it is not error to charge the jury that, to constitute a room, the partition between it and the rest of the house need not extend to the ceiling or roof of the house, but that a partition eight or nine feet high from the floor would be a sufficient partition.

Department 1. Appeal from a judgment of the superior court for Alameda county, and an order refusing a new trial.

Gibson & Whitmore, for appellant.

The Attorney General, for respondent.

BY THE COURT. The information charges a burglary, in that the defendant, etc., did feloniously, etc., enter "the building, to-wit, the ticket-office of the Central Pacific Railroad Company, a corporation," etc., with intent then and therein to commit larceny. The evidence showed that the outer door of the house at the railway station led into a waiting-room for passengers, and in this room was a door leading into an inner room,—the "ticket-office,"—from which the evidence tended to prove the goods were stolen.

1. The information charged an intent to commit larceny. The court was, therefore, justified in refusing to charge the jury that defendant could not be convicted unless he entered the building known as the ticket-office with intent to commit "*some felony*." The charge would have been error against defendant, since it would imply that he could be convicted if he entered with intent to commit *any* felony.

2. The court did not err in refusing to charge that if defendant conceived the purpose of stealing after he entered the *waiting-room*, nor in charging that if the ticket-office was a room or apartment, and defendant entered it with felonious intent, the jury should find him guilty. One who enters with burglarious intent a room of a house enters the house with such intent. 2 Bish. Crim. Law, 97; 2 Whart. 1536, and cases there cited; *State v. Scripture*, 42 N. H. 485; 4 Bl. Comm. 226. Here, where the room in a building was known as the

ticket-office, it was properly described as a "building, to-wit, the ticket-office." If the room was in the house, and the house was a building, a felonious entry into the room was a felonious entry into the building, since burglary consists, not of entry alone, but of *felonious* entry.

3. The court was asked by defendant to charge: "The position of the room mentioned in the testimony as the ticket-office is not a room sufficient to sustain the allegation of the information," etc. Of course, the position of a room is not a room, but the court could not be required so to tell the jury.

4. There was no error in giving the definition of burglary laid down in section 459 of the Penal Code.

5. The court did not err in charging that to constitute a room the partition between it and the rest of the house need not extend to the ceiling or roof of the house, but that a partition eight or nine feet high from the floor would be a sufficient partition. This was not charging a fact, (the facts were left to the jury,) but stating that a room may be constructed without a partition reaching to the ceiling, etc.

6. The charge as to drunkenness was given conditionally, the jury being cautioned that they alone were to determine whether there was evidence on that subject. Besides, there was evidence that the defendant had been drinking before the alleged crime was committed.

7. The jury were properly told that the case must be decided by reference to the evidence bearing upon the issues, and that it was of no consequence whether defendant was married or single, etc.

Judgment and order affirmed.

65 Cal. 230

BONNET v. CITY AND COUNTY OF SAN FRANCISCO. (No. 8,350.)

Filed May 10, 1884.

The board of supervisors of the city and county of San Francisco are authorized by section 21 of the act of 1866 (St. 1865-66, p. 550) to accept a street that is wider than the roadway, and that includes the sidewalks.

On streets not accepted, the expense of constructing and repairing sidewalks is to be borne by property owners, but on accepted streets the expense is to be borne by the city and county.

In bank. Appeal from the superior court of the city and county of San Francisco.

William Craig, for appellant.

C. H. Parker, for respondent.

MYRICK, J. The plaintiff had a contract for the construction of asphaltum sidewalks on Montgomery street, between Jackson and Pacific streets, in the city and county of San Francisco. On streets not accepted, the expense of constructing and repairing sidewalks is to be borne by property owners; on accepted streets, the expense is to be borne by the city and county. Before the commencement of the proceedings resulting in the contract with plaintiff, the portion of Montgomery street above specified had been accepted.

The argument of appellant's counsel is that when the statute of the state and the ordinance of the board of supervisors speak of "street" they mean "roadway." Section 21 of the act of 1866 (St. 1865-66, p. 550) reads:

"When any street, or portion of a street, has been or shall hereafter be constructed to the satisfaction of the committee on streets, etc., of the board of supervisors, and of the superintendent of public streets, etc., and shall have a brick sewer constructed therein, under such regulations as the said board shall adopt, the same shall be accepted by the board of supervisors, and shall thereafter be improved by the city, etc. * * * Provided, that the board of supervisors shall not accept of any portion of the street less than the entire width of the roadway, including the curbing and one block in length, or one entire crossing."

To hold that the word "street," in the body of the section, means "roadway," would make the proviso meaningless. When it is said that the board, upon certain conditions, may accept a street, but shall not accept any portion of it less than the entire width of the roadway, it is very plain that the street it is authorized to accept may be wider than the roadway; in other words, that it may include the sidewalks. And we see nothing in the ordinance in question manifesting the intention to limit the acceptance of the street in question to the width of the roadway.

Judgment and order affirmed.

SHARPSTEIN, J., MORRISON, C. J., and ROSS, J., concurred.

PARKER v. CITY AND COUNTY OF SAN FRANCISCO. (No. 8,351.)

Filed May 10, 1884.

On authority of *Bonnet v. City and County of San Francisco*, ante, 815, judgment and order affirmed.

In bank. Appeal from the superior court of the city and county of San Francisco. The facts of this case are the same as those in *Bonnet v. City and County of San Francisco*, ante, 815.

J. F. Cowdery, for appellant.

C. H. Parker, for respondent.

BY THE COURT. On the authority of *Bonnet v. City and County of San Francisco*, ante, 815, (judgment this day pronounced,) the judgment and order are affirmed.

SUPREME COURT OF CALIFORNIA.

65 Cal. 240

In re Estate of PARSONS, Deceased. (No. 8,016.)

Filed May 14, 1884.

Where an administrator of the estate of a deceased person is appointed, and a document is subsequently filed as a will, which he contests, and employs attorneys for such purpose, the compensation for services of such attorneys is no charge against the estate.

On the settlement of the account of an administrator, though the orders of the court be not technically accurate, if they work no injury to any one they will not be ground for a reversal.

A finding that a certain sum is due the administrator, which finding is not based on the account of the administrator or any of the proceedings, is erroneous.

Department 2. Appeal from the superior court of Santa Cruz county.

C. B. Younger and J. M. Lesser, for appellants.

F. J. McCann and J. H. Skirm, for respondent.

MYRICK, J. This is an appeal from an order settling an account of an administrator.

1. J. W. Parsons was appointed administrator, and subsequently thereto a document was offered for probate as the will of deceased. Said J. W. Parsons contested the probate of the document, and the court adjudged it not to be the will of said deceased. In and about such contest, said J. W. Parsons employed attorneys, (the same who were acting for him as administrators,) and for their services in the contest they charged \$1,000. This item is not a charge against the estate; it was the affair of the heirs, as such, to contest (if they wished) the probate of the document; not of the administrator. The latter is an officer to administer the estate for the benefit of those interested, leaving interested parties to settle their own differences.

2. Objection is made that the court erred in adjudicating upon certain items—clerk's fees and the like—in anticipation of payment. We see no error in this prejudicial to the interests of the estate.

3. The court found that \$122 was due one Thurber for money paid for redemption of real estate from tax sale. There is nothing in the account of the report accompanying the same, or in any of the proceedings, upon which to base this finding; therefore, it had no proper place in the order of settlement.

4. In the order settling the account, the court, referring to the above items and certain others not paid, adjudged that they "are a lien and

charge upon the property of said estate." This may not be technically accurate, but as it works no injury to any one we do not think it necessary to observe further upon it.

The cause is remanded, with instructions to decree a settlement of the account not inconsistent with this opinion. In other respects the order is affirmed, with costs to appellants.

We concur: SHARPSTEIN, J.; THORNTON, J.

65 Cal. 232

PEOPLE v. KEEFER. (No. 10,926.)

Filed May 12, 1884.

If a defendant, indicted for murder, has done no act which made him responsible for the murder, the mere fact that he aided in concealing the dead body would render him liable only as an accessory after the fact,—an offense of which he could not be found guilty under an indictment for murder.

A defendant, however incredible his testimony may be, is entitled to an instruction based on the hypothesis that his testimony was entirely true.

An accessory before the fact to a robbery, although not present when it is perpetrated or attempted, is guilty of a murder committed in the perpetration or attempt to perpetrate the robbery.

But one who has only advised or encouraged a misdemeanor is not necessarily responsible for a murder committed by his co-conspirator, not in furtherance but independent of the common design.

Error in the admission of evidence, or mere refusal to give an instruction, when the accused is not prejudiced or his rights materially affected thereby, will not be ground for a reversal of the judgment.

On a plea of former conviction, under an indictment for murder, the fact that defendant was convicted of murder in the second degree will not be a bar to a conviction of murder in the first degree on a retrial.

Department 1. Appeal from the superior court of Sacramento county.

F. C. Lusk, for appellant.

The Attorney General, for respondent.

McKINSTRY, J. Counsel for defendant asked the court to charge the jury:

"If you believe from the evidence that the defendant, James Keefer, was not present when the Chinaman, *Lee Yuen*, was killed by *Chapman*, and did not aid and abet in the killing, and that defendant, at the time or prior to the killing, had not conspired with *Chapman* to commit the act, and that he had not advised and encouraged *Chapman* therein, and that the killing was not done in pursuance of any conspiracy between this defendant and *Chapman* to rob said Chinaman, and that this defendant only assisted in throwing the dead body of the Chinaman into the creek, then you are instructed that, under the indictment, you must find the defendant not guilty."

It is to be regretted that the foregoing instruction was not given to the jury. Of course, if defendant had done no act which made him responsible for the murder, the mere fact that he aided in concealing the dead body would render him liable only as accessory after the fact,—an offense of which he could not be found guilty under an indictment for murder. However incredible the testimony of defendant, he was undoubtedly entitled to an instruction based upon the hypothesis that his testimony was entirely true.

Assuming the testimony of defendant to be true, there was evidence tending to show that no robbery was committed or attempted. In robbery, as in larceny, it must appear that the goods were taken *animo furandi*; and there was evidence tending to prove that his property was not taken from deceased *lucris causa*, or with intent to deprive him of it permanently. So, also, there was evidence tending to prove that defendant was not personally present at the killing, and that the killing was not done in pursuance of any agreement or understanding to which defendant was a party, but that it was done by Chapman without the knowledge, assent, or connivance of the defendant.

The testimony of defendant was to the effect that he did not advise or encourage Chapman to follow and tie the deceased. But even if we could be supposed to be justified in deciding the *fact*, in holding that his conduct conclusively proved, notwithstanding his testimony to the contrary, that he did encourage Chapman in his purpose to follow and tie the deceased, such encouragement would not, of itself, make him accessory to the killing. An accessory before the fact to a robbery, (or any other of the felonies mentioned in section 198 of the Penal Code,) although not present when the felony is perpetrated or attempted, is guilty of a murder committed in the perpetration or attempt to perpetrate the felony. *People v. Majors*, ante, 597. This is by reason of the statute, and because the law superadds the intent to kill to the original felonious intent. *People v. Doyell*, 48 Cal. 94. One who has only advised or encouraged a misdemeanor, however, is not necessarily responsible for a murder committed by his co-conspirator, not in furtherance but independent of the common design. 1 Whart. Crim. Law, § 229, and note.

In the case at bar, if defendant simply encouraged the *tying* of the deceased,—a misdemeanor which did not and probably could not cause death or any serious injury,—as the killing by Chapman was neither necessarily nor probably involved in the battery or false imprisonment, nor incidental to it, but was an independent and malicious act with which defendant had no connection, the jury were not authorized to find defendant guilty of the murder or of manslaughter. If the deceased had been strangled by the cords with which he had been carelessly or recklessly bound by Chapman, or had died in consequence of exposure to the elements while tied, defendant might have been held liable. But, if the testimony of defendant was true,—and, as we have said, he was entitled to an instruction based upon the as-

sumption that the facts were as he stated them to be,—the killing of deceased was an independent act of Chapman, neither aided, advised, nor encouraged by him, and not involved in nor incidental to any act by him aided, advised, or encouraged. The court erred in refusing the instruction.

Notwithstanding defendant's objection, the court permitted the district attorney to ask a witness, the surgeon who had examined the wounds of deceased: "In regard to that cut on the neck, if the Chinaman was struggling could such a cut have been made?" Conceding, as claimed, it was error to allow the question, the error could not have injured defendant. As stated by counsel for appellant, the contention of the prosecution was that Chapman inflicted the fatal wound while the deceased was perfectly still, and of the defense that it was while Chapman and the deceased were struggling. The answer of the witness to the question was: "It is a wound that might have been made in a scuffle."

The transcript contains no copy of the minutes of defendant's pleas. Penal Code, 1207. It contains, however, a stipulation signed by counsel which refers to a plea of former acquittal. The stipulation also recites that defendant had been tried upon the same indictment in April, 1883, and convicted of murder of the second degree; that on his motion the verdict, guilty of murder in the second degree, was vacated and a new trial granted, because of error at the trial in admitting certain evidence. At the second trial, counsel for defendant requested the court below to charge the jury: "Defendant having been previously tried on this indictment, and found guilty of murder of the second degree, he cannot now be convicted of murder in the first degree."

It is urged by appellant that the refusal of the court to give the foregoing instruction was error which would require the reversal of the judgment and order appealed from.

At the second trial defendant was found guilty of murder of the second degree. It is obvious, therefore, that the mere refusal of an instruction that he could not be convicted of murder of the first degree did not prejudice him. Inasmuch, however, as there must be a retrial of this action, it is proper to add that the conviction of murder of the second degree would not have been a bar to a conviction of murder of the first degree. The indictment charges the crime of *murder*, and the defendant was not acquitted of murder by the first verdict. In dividing the crime of murder into two degrees the legislature recognized the fact that some murders, comprehended within the same general definition, are of a less cruel and aggravated character than others, and deserving of less punishment. It did not attempt to define the crime of murder anew, but only to draw certain lines of distinction by reference to which the jury might determine, in a particular case, whether the crime deserved the extreme penalty of the law or a less severe punishment. *People v. Haun*, 44 Cal. 98; *People v.*

Doyell, supra. After the act of 1856, which divided the crime into murder of the first and second degrees, *murder* remained, and it still remains, the unlawful killing of a human being with malice aforethought. Penal Code, 187, 188. The malice may be express or implied; the express intent to kill or to commit one of the named felonies may be affirmatively established, or, the killing being proved, the malice may be implied, but in either case the crime is murder. The fact that a severer penalty is to be imposed in one case than the other does not change the effect of a previous conviction, and the defendant who, on his own motion, secures a new trial, subjects himself to a retrial on the charge of murder, whether the first verdict was guilty of murder of the first or of the second degree. At the second trial he may, if the evidence justify such verdict, be found guilty of murder of the first degree.

Judgment and order reversed, and cause remanded for a new trial.

Ross, J. As there was testimony tending to show that defendant was not personally present at the killing, and that the killing was not done in pursuance of any agreement or undertaking to which defendant was a party, I agree that the court below erred in refusing to give the instruction first set out in the opinion of Mr. Justice McKINSTRY, and therefore concur in the judgment. I also agree with what is said in the opinion upon the last point discussed.

I concur: McKEE, J.

SUPREME COURT OF CALIFORNIA.

65 Cal. 228

In re ALLGIER and others. (No. 9,423.)

Filed May 10, 1884.

The probate jurisdiction of the superior court is a jurisdiction which is separate and distinct from the jurisdiction of the court in ordinary civil actions.

When a ward attains the age of majority the office of guardian comes to an end, and it is then the duty of the guardian to make a final accounting and settlement with the ward.

Settlement of the final account of the guardian includes only transactions during the minority of the ward, and not transactions occurring after the ward has attained the age of majority; the latter cannot be settled within the jurisdiction of a probate court, but only in an action at law.

The executors of the estate of a deceased guardian have no authority to present an account of the testator, as such guardian, to the probate court, nor to institute proceedings for the settlement of such account in said court; nor has the probate court any authority to exercise jurisdiction over such a proceeding. A settlement of this nature can only be obtained in a court of equity, by a proceeding against the executors of the deceased guardian and other necessary parties.

Department 1. Appeal from the superior court of the city and county of San Francisco.

Cowdery & McCutchen, for appellant.

A. Heyneman and Tully R. Wise, for respondents.

MCKEE, J. In November, 1867, Henry Brickwedel was appointed, by the probate court of Sutter county, guardian of the persons and estate of Delia and Augusta Allgier, then the infant heirs at law of Nicholas Allgier, deceased. The appointee qualified, took charge and control of his wards, and of their estate, and continued in office until the day of his death. He died in the month of April, 1883, without having made a final settlement with the court of his guardianship. After his death, his executors presented to the superior court of Sutter county a report in writing of the condition of the estate, accompanied by a final account, which the court settled and allowed. The account was addressed to the probate jurisdiction of the superior court—a jurisdiction which is separate and distinct from the jurisdiction of the court in ordinary civil actions.

A final account presented by a guardian is properly addressed to the probate court that has jurisdiction of the estate of the ward. But in this instance the account was not presented by the guardian, for he had died before its presentation, and at the time of its presen-

tation he was not in office. Besides, the office had terminated long before his death, for one of his wards attained the age of majority in November, 1870, and the other in August, 1876. When a ward attains the age of majority, the office of guardian comes to an end, and it is *then* the duty of the guardian, and one of the obligations of his bond, to exhibit a final account of his guardianship to the probate court, make a settlement with the probate judge, or with the ward, and deliver all the property in his hands belonging to the ward. Code Civil Proc. § 1754. Failure to do this constitutes a breach of his bond, for which he and his sureties are liable after settlement of the guardianship. Settlement of the final account of a guardian only includes transactions during the minority of the ward; it does not include transactions occurring after the ward has attained its majority. When that event happens, the ward is *sui juris*; and the legal liability which attaches to him, for any services rendered to him by his guardian, arises, not out of the relation of former guardian and ward, but out of the contractual relation established by the transactions between them as contracting parties. Such a liability is not enforceable within the jurisdiction of a probate court; the remedy upon it lies, not in a probate proceeding, but in an action at law.

Of the charges in the account presented by the executors of the deceased guardian against the appellants, as his former wards, for transactions between him and them after they had attained their majority, the court had no jurisdiction. Nor had it jurisdiction of the account itself, for after the death of the guardian, without settlement of his guardianship in the probate court, his executors had no authority to present his final account to the probate court for settlement, for charges made by him against the wards, either during or after their nonage; and the court had no authority to receive, or in any way to act upon it. Presentation of such an account is no part of the duties involved in the administration of the estate of the testator; for, although the property, which was under the control of their testator as guardian, may have come into the hands of the executors, yet the guardianship was a personal trust which did not pass to them on the death of the testator, and the property held by him as guardian did not become assets in their hands to be administered; they merely held it for its preservation until the persons whose estate it is, and for whose benefit it is held, can obtain a settlement of the trust, terminated by the death of the trustee, in the proper forum, where the rights of all parties to the trust may be definitely determined. This settlement can only be had in a court of equity, by a proceeding against the executors of the deceased guardian and other necessary parties. *Lathrop v. Bampton*, 31 Cal. 17; *Chaquette v. Ortet*, 60 Cal. 600; *Theller v. Such*, 57 Cal. 447; *Peck v. Braman*, 2 Blackf. 141. But the executors had no authority to institute such a proceeding for settlement in the probate court; and the probate court

had no authority to exercise jurisdiction over it. *Wetzler v. Fitch*, 52 Cal. 639; *Bush v. Lindsey*, 44 Cal. 121.

Judgment and order reversed, and cause remanded.

We concur: ROSS, J.; MCKINSTRY, J.

65 Cal. 237

WETMORE v. RUPE. (No. 7,838.)

Filed May 14, 1884.

In an action for claim and delivery of personal property, a defendant who recovers judgment, where the property has been delivered to the plaintiff, is entitled to a judgment for a return of the property, or, if all of it cannot be returned, to a judgment for the value of the whole; the wrong-doer cannot through his wrongful act acquire a privilege of restoring to the owner a particular article, or instead thereof paying its value, as found by the jury.

Where the finding of the court is that an action was commenced, and that judgment therein was duly given and made, *held*, a sufficient finding of the facts necessary to give the court jurisdiction.

Department 1. Appeal from the superior court of Sonoma county.

This was an action for the recovery of the possession of certain personal property, or the value thereof. Defendant denied the ownership of the property by plaintiff, alleging the same to have been the property of one John Ward, and that he, defendant, holds the same, as constable, by virtue of certain writs of attachment and execution. The court found, among other things, that there was an agreement between said Ward and this plaintiff for the sale to the latter of such property, but before such agreement was consummated that the defendant herein, as constable, had made a proper levy on the same by virtue of said attachments and execution. The other facts are stated in the opinion.

Porter & Rutledge and *R. A. Frame*, for appellant.

George A. Johnson, for respondent.

BY THE COURT. 1. The court below found there was not an immediate delivery and actual and continued change of possession to and in plaintiff of the goods demanded in this action, and this is not contradicted by the other findings.

2. Appellant contends the judgment should be reversed, because neither it nor any finding determines the value of each article sued for, separately. In support of this contention appellant cites *Waldace v. Hilliard*, 7 Wise, 627; *Farmers' Loan, etc., Co. v. Com. Bank*, 15 Wise, 425; *Whitfield v. Whitfield*, 40 Miss. 369; and *Hoeser v.*

Kraeka, 29 Tex. 455. The first of these cases only decides that the verdict should find the value of the property sued for, and the second that defendant may waive a return of the property and take a judgment for its value alone. In California it has been held that defendant may waive his right to the alternative judgment for value, and may rely on his judgment for the return of the property. *Waldman v. Broder*, 10 Cal. 379; *Whitfield v. Whitfield*, cited from the Mississippi Reports, decided that a judgment in favor of a plaintiff which did not follow a verdict, specifying the value of each article, but which required the defendant to deliver all the articles of property, or pay their aggregate value, was erroneous. *Hooser v. Kraeka*—the Texas case—seems to uphold the view of the appellant. There the court held erroneous a verdict which did not find a separate value of each article recovered, saying: "The defendant should have the privilege of returning any one or more of the articles recovered, instead of paying its value, and *vice versa*; but this would be denied him unless the separate value of each article were found."

We do not agree that the wrong-doer may, through his wrong-doing, acquire a privilege of restoring to its owner a particular article, or paying instead its value, as found by a jury. Under our Code, the judgment is primarily for the return of all the property wrongfully taken or withheld, and the judgment for its value comes into operation only "in case a return cannot be had." Code Civil Proc. 667. So, by section 627, the jury are to find the value of any specific portion of the property only, "if so instructed." Error can therefore only arise in a case where such instruction would be pertinent and proper, and the instruction was asked and refused. In *De Thomas v. Witherby*, 61 Cal. 92, this court held that where a plaintiff replevied goods from a defendant, and a judgment was rendered against him for a return of the property or its value, the plaintiff could not be excused from satisfying the judgment upon a plea that the property had been lost in his hands, even by act of God. In *De Thomas v. Witherby* the language of the superior court of New York in *Suydam v. Jenkins*, 3 Sandf. 614, is cited with approval. "The undertaking of the plaintiff in the replevin bond we conceive is absolute to return the goods, or pay their value at the time of the execution of the bonds. We do not think that a wrong-doer is ever to be treated as a mere bailee, and that the property in his possession is to any extent at the risk of the owner." It cannot be doubted that a plaintiff who, without right, has seized the property of a defendant under a writ is a wrong-doer.

Under our Code, the defendant who recovers a judgment in an action like the present, where the property has been delivered to the plaintiff, is entitled to a judgment for a return of the property; and if the property—all of it—cannot be returned, then to a judgment for the value of the whole. In the case at bar the court found the value of the property to be \$400, but ordered an alternative judgment

for \$155.45. Appellant cannot complain that the judgment was for less than the value of the property.

3. The answer alleges that defendant was a constable, and that in the action, *Glenn v. Ward*, in the justice's court, an attachment issued upon an affidavit and undertaking,—the contents whereof, showing conformity to the Code, are set forth,—and that defendant, as constable, under the attachment levied on the property, it being in the possession of Ward; that in the action, *Glenn v. Ward*, a judgment was afterwards duly given, upon which execution issued to defendant, who levied the same on the attached property, etc. The findings are as full as the pleading, the finding with respect to the judgment being that it was "duly given and made." The facts constituted a defense for the constable. *Thornburgh v. Hand*, 7 Cal. 554. It is urged that there is no finding there was anything due from Ward to Glenn at the commencement of the attachment suit. But there is a statement in the answer that the suit was commenced on "an obligation incurred in Santa Rosa, said county;" and, if this was an imperfect averment of indebtedness, plaintiff did not demur generally or specially. The court found: "All the other issues than those herein before specifically mentioned are found in favor of defendant."

4. It is said by appellant that the judgment in the attachment suit is void, because Ward was not served with summons. This must mean that it does not affirmatively appear he was served in the findings herein. But the finding is that the action was commenced in the justice's court, etc.; judgment "duly given and made." This includes a finding of the facts necessary to give the court jurisdiction.

Judgment affirmed.

(2 Cal. Unrep. 303)

PEOPLE v. BIGGINS. (No. 10,859.)¹

Filed May 15, 1884.

Where a demurrer to an information is overruled, and a plea of not guilty is entered, the court may set aside the order overruling such demurrer, and allow counsel for the people to confess the demurrer, and file a new information, and such order will be equivalent to an allowance of the demurrer.

An information is sufficient, on demurrer, which complies substantially with the provisions of the statute.

Where, by the evidence, it was shown that deceased while drunk had assaulted defendant, who thereupon knocked him down, and, while lying helpless on the ground, jumped with both feet on his face, from which act death ensued, *held*, that the killing was unlawful and felonious; that there were none of the elements of involuntary manslaughter in such act; and that the charge of the court to that effect was correct.

Where, at the request of a party, certain instructions are given, he cannot thereafter complain of them.

Instructions to a jury should be given with reference to the imminent facts in the case. If controverted, instructions upon them should be hypothetical, leaving

¹ Reversed in banc. See 4 Pac. 570, 65 Cal. 565.

the supposed facts which the evidence tends to prove to the consideration of the jury. If uncontroverted, the court may assume them.

Where the charge to the jury, considered as a whole, correctly states the law, and no portion of it is calculated to mislead the jury, the verdict should not be disturbed, although some part of the charge, standing alone, may contain some inaccuracy of expression which would be the subject of criticism.

Department 1. Appeal from the superior court of Fresno county.

W. D. Tupper, for appellant.

Atty. Gen. Marshall, for respondent.

MCKEE, J. On August 28, 1882, an information was filed in the superior court of Fresno county against Patrick Biggins, charging him with having committed the crime of murder. Upon demurrer it was held to be defective, and, by direction of the court, a new information was filed, to which a demurrer was interposed, which was overruled, and the defendant then entered a plea of not guilty; but upon the day fixed for trial counsel for the people moved the court to set aside the order overruling the demurrer to the information, and allow him to confess the same. The court granted the motion, and entered an order setting aside the overruling of the demurrer, and thereupon, as was recited in the order, counsel for the people confessed the demurrer, and the court directed another information to be filed. Upon the filing of the third information the defendant, after a demurrer to it had been overruled, entered two pleas,—one not guilty and the other a former acquittal. Upon these he was tried and convicted of murder of the second degree.

In the course of the preliminary proceedings it was objected, and on appeal it is now objected—*First*, that after a plea of not guilty had been entered to the second information, upon which the case was set down for trial, it was error for the court to set aside its order overruling the demurrer, which had been filed to the information, and to allow counsel for the people to confess the demurrer and to file a new information; *secondly*, after the order overruling the demurrer had been set aside, and the demurrer was confessed, the court erred in not rendering or entering judgment upon the demurrer; and, *thirdly*, that the court erred in overruling the demurrer to the third information.

1. The court had jurisdiction to set aside the order, and to allow counsel to confess the demurrer and to direct the filing of a new information. Code Civil Proc. § 128; Penal Code, § 1008.

2. When the order was set aside it would have been more formal to have entered an order allowing the demurrer. Penal Code, § 1007. But the order entered, allowing the confession of the demurrer, and directing a new information to be filed, was the equivalent of an order allowing the demurrer. In legal effect the confession involved and

decided the validity of the information, and left the defendant in the position of a person accused of crime, against whom no valid information had yet been filed. The proceedings, therefore, by which the information filed against him was invalidated, did not effect any substantial right of the defendant; and there was no prejudicial error in invalidating it, and in directing another to be filed.

3. The information upon which the defendant was tried and convicted substantially complied with the requirements of sections 950, 951, Penal Code, and the court did not err in overruling the demurrer to it.

Next it is contended that the court erred in refusing to instruct the jury upon the subject of involuntary manslaughter. There was no refusal to instruct upon the subject of manslaughter. On the contrary, the presiding judge gave the definition of voluntary and involuntary manslaughter contained in the Penal Code, and defendant's counsel asked for no additional instruction upon the subject. But the court, in connection with its charge, told the jury that the law of involuntary manslaughter was inapplicable to the case before them, and this is complained of as error.

The case, as made out by the evidence contained in the record, was this: On the afternoon of July 30, 1882, Alexander, the deceased, and Biggins, the defendant, were drinking liquor, playing cards, and singing songs in the bar-room of the Berenda Hotel, in Fresno county. They continued at that until about 5 o'clock in the evening. At that hour "Alexander was very drunk,"—"so drunk he could just keep from falling." Defendant had only drank about half a dozen glasses of beer. In that condition of the two men the proprietor of the hotel left them alone in the bar-room while he went to the railroad station, about 80 yards from the hotel, to put the Berenda mail-bag on board the train, which had just arrived at the station. After he left the bar-room for that purpose the two men came out on the front porch of the hotel, Alexander standing about five or six feet from the door. Suddenly he was seen to fall backwards inside the door of the bar-room, his feet sticking up outside the door. In that position the defendant as suddenly jumped with both feet upon the upturned face of the fallen man, completely mashing it. "His nose was mashed flat, his eyes were mashed out, and the jaws were mashed down; his blood oozed on the floor and was spattered on the walls." A witness of the act shouted at the defendant, who immediately ran to the railroad station, where he tried to board the train; but before he succeeded in his purpose he was arrested. Alexander was immediately lifted up and carried into the bar-room, where, on being laid down upon a mattress, he died.

As to these facts there was no conflict of evidence. The record contains no other testimony given for the defendant than his own. As a witness in his own behalf he testified that he struck Alexander a blow with his right fist, which knocked him through the door of the

bar-room, down upon the floor; that in giving the blow he fell with Alexander, striking his own head so violently against the floor that he remembered nothing afterwards until he was arrested; that he knocked Alexander down because he had followed him out onto the porch, where, having grabbed him by the left shoulder, he, Alexander, struck him on the right shoulder and one of his arms, wounding him with a knife having a blade three inches long, on which he saw blood. But it was proved that Alexander was left-handed; that he was not in the habit of carrying any weapons whatever; and that no knife was found near or on his person when he was taken up and carried into the bar-room where he died, but the next day a closed pocket-knife was taken from one of his pockets. It was also proved that, some years before, there had been an old grudge between Alexander and the defendant, in which the latter had threatened to get even some day.

According to the testimony of the defendant himself the case was not one of involuntary manslaughter. Assuming his testimony to be true, that he knocked down a drunken man for assaulting him, yet the facts remained uncontroverted that he did, after knocking him down, and while he lay prone and helpless, jump with both feet on his face, and that death ensued from the act. Such an act is felonious. Penal Code, §§ 203, 204, 245. In no condition of society, civilized or uncivilized, can it be considered lawful to stamp out the life of a man under such circumstances. The act was therefore unlawful and felonious. Being such, there was in it none of the elements of involuntary manslaughter, and the charge of the court to that effect was correct. *People v. King*, 27 Cal. 507.

Where death ensues from an act committed under circumstances showing no considerable provocation to have existed, or an abandoned and malignant heart, or that the defendant did not intend the fatal blow to produce death, yet intended the blow, it is murder in the second degree. *People v. Foren*, 25 Cal. 361.

The act, in connection with the circumstances in which it was committed, made the defendant guilty of either murder of the first or second degree, or of voluntary manslaughter, or he was guiltless of any crime; and the questions arising out of the case for the determination of the jury were whether the act which resulted in the death of Alexander was the result of malice or passion, or of a necessity, real or apparent, which justified it, or whether it was committed by the defendant while unconscious of what he was doing. Upon all these questions—murder of both degrees, voluntary manslaughter, justifiable and excusable homicide, and irresponsibility in law for acts committed in mental unconsciousness—the court explained the law to the jury by instructions, given at the request of the people and the defendant, which, in their combination and entirety, were correct. Upon some of them, criticisms of more or less force have been made. But, so far as appears from the record, most, if not all, of the chal-

lenged instructions were given on the part of defendant himself; and it is a well-settled rule that a party will not be heard to complain of instructions given at his own instance.

The main assignment of error, however, is that the court, in its charge, assumed as facts the death of Alexander; that the means adopted by the defendant caused his death; and that the manner of his death was brutal. In assuming these things as facts, it is contended that the court trenched upon the province of the jury. The alleged assumption that the manner of Alexander's death was brutal, is predicated on the following instructions to the jury:

"The means adopted by the defendant which caused the death of deceased may properly be looked to in ascertaining whether the killing was malicious. If a deadly weapon was used, or means calculated to produce death, or the killing was done in a brutal and inhuman manner, and the killing not done in self-defense, or in sudden heat of passion, the jury will be at liberty to find that the slayer was actuated by malice, and the killing will be murder."

"* * * If the jury believe from the evidence that the defendant, without receiving any considerable provocation, resented acts or words of the deceased in a brutal manner, indicating malice and an abandoned heart, defendant is guilty of murder."

Both instructions were predicated upon a supposed state of facts which the evidence tended to prove. Whether they were proved was a question of fact; and whether, if found, they established malice in the act committed by the defendant, was one of the questions which they had to decide. The instructions were therefore properly given to aid the jury in coming to a correct conclusion upon the question whether the killing was malicious.

As to the assumption that Alexander was killed, and that his death ensued from the act of the defendant, neither of these things were denied. Neither his death, nor the means causative of his death, nor the time and manner of his death, were called in question; they were therefore uncontroverted facts. Such facts may be assumed as the basis of an explanation of the law regarding them.

Instructions to a jury should be given with reference to the imminent facts in a case. These may be either controverted or uncontroverted. Whether one or the other, they constitute the basis of instructions. If controverted, instructions upon them should be hypothetical, leaving the supposed facts which the evidence tends to prove to the consideration of the jury. If uncontroverted, the court may assume them; for when the evidence to a fact is positive, and not disputed or questioned, it is to be taken as an established fact, and the charge of the court should proceed on that basis. It is only where there may be doubt, that the jury are required to weigh the evidence, and it is then only that the rule applies that the court shall not charge the jury upon the weight of evidence. *Wintz v. Morrison*, 17 Tex. 372-387; *Hughes v. Monty*, 24 Iowa, 499; *Harrison v. Roy*, 39 Miss. 397.

There was no error in the ninth instruction.

Considered and construed as a whole, the charge stated the law of the case correctly, and the case was presented fairly to the jury. We find no portion of it calculated to mislead the jury to an erroneous conclusion; and, that being the case, their verdict should not be disturbed, even although some part of the charge, standing alone, may contain some inaccuracy of expression which would be the subject of criticism. *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *W. & W. R. Co. v. Ingraham*, 77 Ill. 309.

Judgment and order affirmed.

Ross, J. I concur in the judgment.

McKINSTRY, J. I concur in the judgment. The court below correctly charged that the law of involuntary manslaughter was inapplicable to the case. The defendant was entitled to an instruction based upon the hypothesis that his testimony was true. But, if his testimony was true, his act in striking the deceased—who held in his hand a bloody knife, three inches long, with which he had stabbed defendant at least twice—was not unlawful, but was an act of necessary self-defense. Involuntary manslaughter is the unlawful killing of a human being without malice, in the commission of an unlawful act, not amounting to a felony, or in the commission of a lawful act, which might produce death, in an unlawful manner, or without due caution or circumspection. Penal Code, 192. Conceding the facts to be as stated by defendant, and the death to have been the result of a blow with his fist, the killing was justifiable. It was done in resisting an attempt to murder, or to do great bodily injury. *Id.* 197. It follows the court properly told the jury the law of involuntary manslaughter was not applicable to any phase of the evidence.

The court charged:

"Insulting words, gestures, or actions will not reduce an unlawful killing from murder to manslaughter, unless the gestures or actions are such as to reasonably induce the belief of danger to life, or of great bodily harm, in the mind of the party against whom they are used."

This was plainly error. But, inasmuch as the testimony of defendant (the only witness examined on his behalf) tended to prove, and, if credible, did prove, the killing to have been done in necessary self-defense, while the evidence on the part of the prosecution tended to prove a murder, an erroneous charge with respect to manslaughter could not have prejudiced the defendant. The killing by defendant being proved, the only other issue made by the evidence for or against him, and which the jury had to determine, was: Was the killing murderous or justifiable? Under these circumstances a verdict, guilty of manslaughter, could not have been a proper verdict, and defendant cannot complain of an instruction which may have induced the jury not to find such verdict. The court properly instructed them as to the law of self-defense.

65 Cal. 244

SERE v. McGOVERN and others. (No. 8,468.)

Filed May 15, 1884.

The entry of an order of dismissal as to one of the parties ousts the jurisdiction of the court as to such person, and judgment subsequently rendered against him, without vacating the order of dismissal, is void. The court can only resume jurisdiction by vacating such order.

Where a sale is made conditional on the performance of some act, as the payment of the consideration within a limited time, which act is not performed, the title in the object of the sale does not pass to the vendee.

Department 1. Appeal from the superior court of the city and county of San Francisco.

J. W. Harding and *J. M. Wood*, for appellant.

A. D. Splivalo, for respondents.

McKEE, J. Two appeals have been taken in this case,—one by the defendant Afflebach from the judgment and order denying a motion to amend the findings and judgment, and the other by the plaintiff, Sere, from the judgment and order denying his motion for a new trial. The judgment was rendered in an action for the settlement of a partnership which had existed between the plaintiff, Sere, and the defendant McGovern, under the firm name of McGovern & Sere, for 19 months, until the fourteenth of February, 1880, when it was dissolved by mutual consent, and the partnership property was left in the hands of the defendant McGovern. Afflebach was named in the complaint as a party defendant, because, as alleged in the complaint, he claimed an interest in the property. The existence of the partnership for the time stated in the complaint was not denied by the answer of either of the defendants. Afflebach in his answer averred he was the absolute owner of part of the property by purchase from McGovern after the dissolution of the partnership, and McGovern in his answer set up that soon after the commencement of the action he was adjudged an insolvent debtor, and the entire property in controversy passed into the hands of the assignee in insolvency. By a supplemental complaint the assignee was brought in as a party to the action. In his answer he claimed that on the day of the dissolution of the partnership the plaintiff, Sere, transferred by a bill of sale all his estate and interest in the property to the defendant McGovern, who thereby became, and continued to be, the absolute owner of the same until the day he was adjudged an insolvent debtor. On the trial of the issues raised by the pleadings, the court, on September 1, 1881, "after the parties had rested their case," ordered that the action be dismissed as to the defendant Afflebach, but afterwards—on January 13, 1882—the court, without vacating the order of dis-

missal, filed a decision in favor of the assignee in insolvency, and gave judgment thereon against the plaintiff, Sere, and the defendant Afflebach for recovery of the possession of the property, and costs.

The judgment against Afflebach was void. The entry of the order of dismissal ousted the court of jurisdiction of the person of Afflebach; and, thereafter, jurisdiction over him could not be resumed and exercised without vacating the order. Upon the entry of the order, the defendant ceased to be a party to the action, and was not bound by any of the subsequent proceedings therein. The judgment entered against him was therefore irregular and void. And the judgment against Sere was erroneous, because the fact upon which it was rendered was not sustained by the evidence. Without conflict, the evidence showed that the alleged sale of the partnership property by Sere to McGovern was not an absolute sale; it was a sale conditional upon payment of \$1,500 gold coin, payable in two installments,—one-third thereof on February 14, 1881, and the remainder on the fourteenth of June thereafter, "time to be considered of the essence of the agreement;" and if payment was not made within the time specified, the moneys paid under the agreement to be forfeited, and the vendor had the right to the possession of the property. When the first installment matured, payment was demanded and refused; and when the plaintiff commenced the action in hand, McGovern resorted to his proceedings in insolvency. The court found that no part of the \$1,500 had been paid, according to the terms of the agreement, although payment had been demanded. Yet, although the conditions had not been performed, and the defendant absolutely refused to perform them, the court decided that title passed by the executory agreement to McGovern, and he became the absolute owner of the property. This was erroneous. It is well settled that a conditional sale dependent upon an act to be done, which is not done, does not pass title. *Whitney v. Eaton*, 15 Gray, 225; *Stone v. Perry*, 60 Me. 48; *Paul v. Reed*, 52 N. H. 136; *Russell v. Minor*, 22 Wend. 659.

Judgment and order reversed, and cause remanded for a new trial.

We concur: ROSS, J.; MCKINSTRY, J.

2 Cal. Unrep. 310

MARTIN v. HILL and others. (No. 7,923.)

Filed May 17, 1884.

The construction by the lower court of the contract sued upon *held* erroneous, and judgment and order reversed, and cause remanded.

Department 2. Appeal from the superior court of Marin county.

This was an action by plaintiff to be declared owner of certain lands, and that one of the defendants, L. W. Walker, be declared to hold the same in trust for him, and that defendants be compelled to execute a deed to him. Prior to the commencement of this action a suit in partition was pending between owners of undivided interests in the rancho Laguna de San Antonio. Certain of the parties, to protect their interests, formed an association, and entered into a contract whereby they agreed that on the decree of partition the parties to such agreement might have a right to purchase from the general interest, through the association, such portions of the property as would be necessary, after such decree, to give them title to property then in their possession. The defendant L. W. Walker was an owner of an undivided interest, and a party to such agreement. Martin, the plaintiff herein, had no title, and was not made a party to the partition suit, nor did he appear therein; he was a mere trespasser on the rancho, but before the decree he purchased of said Walker a parcel of undivided interest,—the equivalent of the parcel here sued for,—in order to protect his possession thereto. He then, with the other parties before mentioned, entered into such agreement. He now, after decree of partition, claimed a right and brought this suit to enforce a conveyance of such property to him. Defendants refused to make such conveyance, denying his right to the same on the ground that such agreement was only for the purpose of securing the parties to such partition suit, so that if, after partition, they had not title to such land, or portions thereof, as they were in possession of, they might purchase of the association sufficient to give them proper title thereto. The lower court rendered judgment for defendants on the grounds set forth by them. Plaintiffs appealed. The other facts are set forth in the opinion.

E. S. Lippitt, for appellants.

A. W. Thompson, for respondent.

BY THE COURT. The substantial point in this controversy is thus stated by appellant in his points: "Did the defendants agree with plaintiff to make title to the land in him, and have they performed their agreement? and if not, should they be compelled to do so?" The court below, in its opinion, used the following language:

"To hold in the case at bar that the plaintiff may purchase from the parties to this contract lands in his possession, the same being a part of the rancho Laguna de San Antonio, is, in substance, saying that he must be allowed to take his undivided interest in the rancho Laguna de San Antonio from the remainder of said rancho, and such is not the meaning of the contract under consideration, nor was it in any single sense the intention of the parties to such contract."

We think the principal object of the contract was to enable the parties to it to acquire title to the lands in their possession respectively, and that the court erred in its construction of the contract. That being the case, and as the defendants have not performed their agreement in that regard, and as they should be compelled to do so, plaintiff is entitled to judgment.

In our opinion, the claim that plaintiff urges against Walker is entirely outside of this case, and we see no reason why his urging such claim against Walker should deprive him of the judgment to which he would otherwise be entitled. Whatever claim he makes against Walker must depend upon some contract between Walker and himself. If, under such contract, his claim is valid, he should be allowed to enforce it. If invalid, it is not to be supposed that he can enforce it. But in no view can it be held that plaintiff, having complied with the contract counted on in this case, is not entitled to the relief which he asks, by reason of the fact that he has brought a suit against Walker, based on some other claim which he may or may not succeed in sustaining. If the relief obtained by plaintiff here is a defense to Walker, in the suit against him, Walker will have abundant opportunity for setting it up in that case.

Judgment and order reversed, and cause remanded, with instructions to render judgment for plaintiff in accordance with the prayer of his complaint.

2 Cal. Unrep. 313

PEOPLE *ex rel.* BUCKNER *v.* VEUVE. (No. 9,124.)

Filed May 17, 1884.

There is no such office as "police justice of the city of San Jose," and therefore such office cannot be usurped, intruded into, or unlawfully held or exercised.

The exercise by a justice of the peace of jurisdiction outside of that conferred by the constitution is not the exercise of an office, and the result thereof would be to render acts done outside of such jurisdiction void.

In bank. Appeal from the superior court of Santa Clara county.

This was a proceeding against the defendant for usurpation of the office of "police justice of the city of San Jose." The defendant answered that there was no such office existing, and that the jurisdiction which he exercised was that conferred on a justice of the peace, which office he held, and which included the powers of a police judge; and the trial court so found. Plaintiff appealed.

Atty. Gen. Marshall and W. B. Hardy, for appellant.

D. W. Harrington, for respondent.

BY THE COURT. There is no such office as "police justice of the city of San Jose;" therefore, the defendant could not have usurped, intruded into, or unlawfully held or exercised that office. Conceding the act to be unconstitutional which in terms confers jurisdiction on justices of the peace in cities of more than 10,000 inhabitants which other justices of the peace do not possess, the exercise of such additional jurisdiction would not be the exercise of an office, but the exercise of jurisdiction outside of the office of justice of the peace; the result of which would be to render acts done outside of such jurisdiction void.

Judgment affirmed.

McCUE v. TUNSTEAD. (No. 7,306.)

Filed May 19, 1884.

Two horses owned by a judgment debtor engaged in husbandry are exempt from execution; it is not essential to such exemption that the owner should devote himself exclusively to husbandry, or that the horses should be used exclusively for that purpose.

Department 2. Appeal from the superior court of Marin county.

J. S. McCue, for appellant.

T. J. Crowley, for respondent.

BY THE COURT. The court found, in substance, that the plaintiff was the owner and in the possession of a farm of about 150 acres of land, which he cultivates for raising grain, etc., and that the horse which this action was brought to recover was used as a work-horse on said farm—sometimes singly and sometimes doubly. It is also found that the plaintiff is the publisher of a weekly newspaper and the proprietor of patent medicines, although his main reliance for support is upon his farm, "and almost the entire income from that is from the services of said horse as a stallion, and the agistment of mares for breeding to him." The plaintiff is the owner of other horses pledged for a debt owing by him, and in the possession of the pledgee.

In addition to "the farming utensils or implements of husbandry of the judgment debtor," the law exempts from execution *two horses*. Code Civil Proc. § 690, subd. 3. The findings establish beyond doubt that the plaintiff employed this horse in husbandry. He was

a farm-horse in the same sense that the plows, harrows, and wagons used on the farm were utensils or implements of husbandry. Conceding that some of the uses to which the horse was put were not strictly in the line of husbandry, he was nevertheless one of two horses owned by the judgment debtor, and employed by him in husbandry. The law does not specify how much or what use shall be made of "the farming utensils or implements of husbandry," or of the two horses exempted from execution. They are exempt because owned by a judgment debtor engaged in husbandry. And in order to make them exempt it is not necessary that the owner of them should devote himself exclusively to husbandry. Such is not the language of the law. It does not say the farming utensils, etc., of a husbandman or farmer shall be exempt, but the farming utensils, etc., of husbandry; that is, utensils, etc., employed by the judgment debtor in husbandry or farming. This is the obvious meaning of the language, and we do not feel at liberty to hold that when a judgment debtor shows that he is carrying on a farm, and has but two horses which he uses in farming, that they are not exempt because he sometimes uses them for some other purposes. That would necessitate the importation of something into the law which it does not now contain.

Judgment reversed, with directions to the court below to enter judgment in favor of the plaintiff on the findings.

65 Cal. 247

SAN JOAQUIN VALLEY BANK *v.* BOURS. (No. 7,743.)

Filed May 20, 1884.

Where large sums of a bank's funds are loaned to an individual by the cashier of a bank without any security, and without any entry thereof in the books of the bank, such cashier having power to transact the business of the bank under direction of the board of trustees, and he, to conceal the loans from the knowledge of the board of trustees, makes false reports of the amount of cash on hand, he will be liable to such bank for the money lost on such loan, though the trustees neglect their duty in not regularly counting the cash as required by the by-laws.

Where a regular charge was made by the defendant, a cashier, on the books of a bank, for his salary, which charge was acquiesced in by the trustees, *held*, that this amounted to an agreement to the charge made by defendant for his services.

Department 1. Appeal from the superior court of San Joaquin county.

Terry, McKinne & Terry, for appellant.

W. L. Dudley and J. B. Hall, for respondent.

Ross, J. The plaintiff is a banking corporation, and the defendant, from the thirtieth day of March, 1868, to March 17, 1877, was

its cashier. By the by-laws of the bank the president and cashier were each empowered "to discount bills, notes, or other evidences of debt, to buy and sell bills of exchange, to make loans with or without security, * * * and generally to transact and carry on the business of the bank, subject to the direction of the board of trustees expressed through the by-laws, or such express resolution as may, from time to time, be passed; and they shall each report to the board of trustees, when required, each and everything by them, or either of them, transacted." The evidence shows, and the findings of the court below are to the effect, that the defendant was the active manager of the bank. Between the first day of January, 1871, and the first day of October, 1874, he loaned, personally and through the assistant cashier, to one De Blainville divers sums of the plaintiff's money—in the aggregate \$36,599, or thereabouts. Those loans were made without any security being taken therefor, and no entry or memorandum thereof was made in the books of the bank. Nor was any note or memorandum of any kind whatever made or kept by defendant of the transactions with De Blainville save and except *memoranda* upon slips of paper, called, in the record, "tags," and kept in the bank on a wire, which tags showed the amounts loaned to and paid by De Blainville, and the balance due by him from time to time. On the twelfth day of March, 1877, there remained, and ever since has remained, unpaid, of the moneys so loaned to De Blainville by defendant, the sum of \$9,247.49.

The by-laws required that the board of trustees should every month examine into the affairs of the bank, count its cash, and compare its assets and liabilities with the balances on the general ledger, for the purpose of ascertaining the condition of the bank and whether the books were correctly kept. The duty thus imposed upon the board seems, from the record, to have been grossly neglected; for prior to the month of March, 1877, the cash does not appear ever to have been counted by it, and none but the most superficial examination made into the affairs of the bank. The board, however, met monthly, and to it at each meeting the defendant presented as his report a book of general balances, which, among other things, purported to represent the amount of cash on hand. These representations—so far, at least, as the item of cash was concerned—were untrue; for the amount of cash represented by the book of general balances was more than the amount of cash in the vaults of the bank by the amount represented by the "tags" already alluded to. The defendant thus represented to the board of directors that certain money of the bank was in the vaults, whereas in truth he had loaned it to a man, not only without security and without taking from him the slightest evidence of indebtedness, but, so far as appears, without interest, and from whom he never made the slightest effort to collect it. And there is testimony going to show that when, in March, 1877, the board of directors concluded to count the cash, defendant, on being informed

of that intention, instructed the assistant cashier to put the "tags" away, immediately left the bank, and a few days afterwards resigned his position. To hold that one intrusted with the care and management, for profit, of funds of another, can dispose of those funds as did the defendant without liability to himself, would be, as we conceive, to do violence to the most obvious principles of law and justice. It is no justification of the defendant to say that the directors of the bank did not do their duty; that if they had counted the cash they would have found it short, and their attention would thus have been attracted to the "tags," and so to the fact of the loans to De Blainville. The defendant stood in a position of trust and confidence, and he was at least bound to act in good faith in respect to the property intrusted to him. If it be admitted that he was not bound to report the condition of the affairs of the bank to the board of directors, unless such report was by the board required, still he was bound in law and conscience to make such report as he did make speak the truth. Defendant was rightly held liable by the court below for the amount of the De Blainville indebtedness.

But upon another question in the case the judgment and order must be reversed, and the cause remanded for a new trial. The defendant was first appointed cashier, by the board of trustees of the plaintiff, on the thirtieth day of March, 1868, for the period of three months. On the first Wednesday of July, 1868, he was reappointed for the period of 12 months. After that there was an annual election or employment of him as cashier by the board of trustees, pursuant to the by-laws of the bank. Defendant's compensation as cashier was never fixed by any resolution of the board of trustees, but it appears that when first appointed there was a verbal understanding between himself and the trustees that he was to draw a salary of \$200 per month; and this salary he did draw and charge himself with from the time of his entry upon the duties of his office to the first day of April, 1870. From the date last mentioned defendant drew the sum of \$300 per month as his salary as cashier. This sum he caused to be charged against himself in the books of the bank, and he so returned it in the book of general balances presented to the board of trustees at their monthly meetings. The board must therefore be held to have had knowledge of the fact that defendant was charging and drawing for his services as cashier the sum of \$300 per month, and with this knowledge they continued to reappoint him cashier for seven successive years. Under such circumstances the board of trustees must be held to have agreed to the charge made by the defendant for his services as cashier.

Judgment and order reversed, and cause remanded for a new trial.

We concur: McKEE, J.; McKINSTRY, J.

65 Cal. 254

REGO v. VAN PELT. (No. 7,759.)

Filed May 20, 1884.

In ejectment, where both plaintiff and defendant claim under a common grantor, neither is called on to show a right of possession in said grantor, nor can either assail his title.

A quitclaim deed, even prior to the act of February 22, 1854, is sufficient to pass any estate the grantor had, and the grantee may maintain ejectment thereon if his grantor could have done so.

The complaint, in an action of ejectment, which avers that "defendants are in possession of said lands and the whole thereof, withhold the possession of the same from plaintiff, and exclude him from the same," sufficiently alleges an ouster by defendants.

Department 1. Appeal from the superior court of Santa Clara county.

S. O. Houghton and J. Reynolds, for appellant.

Moore, Laine & Johnston, for respondents.

BY THE COURT. Appellant says plaintiff and the grantor of defendant were not *tenants in common*, because their grantor, Evans, had no estate or interest in the premises, founded upon title, or rightful possession. But Evans had actual possession, and delivered such possession to his grantees. In ejectment, neither is plaintiff called on to show a right of possession in a person from whom both he and defendant deraign, nor can defendant assail the title of the common grantor. The unity of possession, where both derive from the same source, cannot be denied by either. The deed from Evans and wife to plaintiff and Hammond (grantor of defendant) was executed February 22, 1854, prior to the passage of the act which, it is claimed, first made *quitclaim* deeds operative as conveyances, without any precedent estate or interest in the grantee. But, as was said in *Graff v. Middleton*, 43 Cal. 344, "in this state, from the earliest times, quitclaim deeds have been in every-day use for the purpose of transferring title to land, and have been considered as effectual for that purpose as deeds of bargain and sale." In *Sullivan v. Davis*, 4 Cal. 291, decided at the October term, 1854, it was held that a quitclaim conveyed all the right and title of the grantor or releasor. And in *Frey v. Clifford*, 44 Cal. 343, the supreme court said that under the registry law a quitclaim deed, received in good faith and for a valuable consideration, which is first recorded, will prevail over an older deed subsequently recorded. So, in *Lawrence v. Bullou*, 37 Cal. 521, it was held that a quitclaim deed passed the title. No reference is made to the statute of 1855. Without making the rule in any respect dependent upon the statute, *Downer v. Smith*, 24 Cal. 123, and *Carpentier v. Williamson*, 25 Cal. 154, concur in construing *Sullivan v.*

Davis, supra, as holding that an ordinary quitclaim deed in this state is sufficient to pass any estate the grantor had, and to enable the grantee to maintain ejectment if his grantor could have done so. As we have seen, the defendant here cannot dispute the title of Evans, the grantor of plaintiff and Hammond.

The complaint (certainly in the absence of a special demurrer) sufficiently alleges an ouster by defendants. *Payne v. Treadwell*, 16 Cal. 244. It avers: "Defendants are in possession of said lands and premises, and the whole thereof, withhold the possession of the whole thereof from plaintiff, and exclude plaintiff from the same."

Judgment affirmed.

65 Cal. 267

PEOPLE v. BENNETT. (No. 10,960.)

Filed May 20, 1884.

Errors in the admission evidence which are not prejudicial to the prisoner, are error without injury, and not a ground for reversal.

Where, in a criminal prosecution, the jury comes into court with a verdict, and the defendant's attorney is notified of the fact, the court, after waiting a sufficient length of time for the attorney to come into court, if so disposed, is justified in receiving the verdict, polling the jury, and discharging it.

In bank. Appeal from the superior court of Solano county.

Jos. McKenna and *G. Lamont*, for appellant.

Atty. Gen. Marshall, for respondent.

SHARPSTEIN, J. Whether the deceased "usually walked with his hands in his pockets" would not have been of the slightest importance, and would therefore have been an immaterial circumstance, if the defendant had not, after the admission of evidence as to the habit of deceased in that respect, attempted to prove that when deceased was shot he had his hand in his pocket with the intention, as defendant supposed, of drawing a deadly weapon therefrom, with which to attack him. When the question objected to was asked, it was simply immaterial, and evidence that deceased usually walked with his hands in his pockets could not have prejudiced the defendant any more than evidence that the deceased usually walked with his hands outside of his pockets would. Such evidence in no way tended to strengthen the case of the prosecution. The only effect it could have had was to weaken that of the defendant. And whether introduced before or after the defendant had developed his defense, the effect would have been the same. So that the only question is whether it would have been admissible at any stage of the trial. The insistence of defendant's coun-

sel is that it would not, "unless the knowledge of such habit" could be "brought home to the defendant." Precisely how this should have been done is not stated. If the deceased usually walked with his hands in his pockets, the defendant might or might not have observed it. The probability of his having done so would depend largely on the opportunities he had had for observing it. So that the weight of such testimony would depend on circumstances which it was proper for the jury to consider. But there is another ground on which such evidence was, in our opinion, clearly admissible. The defendant testified that when he shot the deceased the latter had his hand in his right pantaloons pocket. Several witnesses for the prosecution testified that he was walking with both hands in the front pockets of his pantaloons. Under such circumstances, evidence that he usually walked with them there tended to corroborate the evidence of the witnesses who testified that when shot he was walking with them there. It would have been better to have waited until the defendant had introduced evidence on this point before introducing the evidence objected to, and then to have introduced it in rebuttal. But, as before suggested, it would then have been no less prejudicial to the defendant. At most, it was error without injury.

When the jury came into court with a verdict, and the defendant's attorney was informed of the fact, we think the court, after waiting a sufficient length of time for said attorney to come into court, if he had been so disposed, was justified in receiving the verdict, polling the jury, and discharging it, as was done. It is impossible to see, and no attempt was made to show, how the defendant could have been prejudiced, in any degree, by the action of the court.

Judgment and order affirmed.

We concur: MYRICK, J.; THORNTON, J.

ROSS, J. I do not agree that the court below was right in admitting testimony as to the custom of deceased in walking with his hands in his pockets; but, in view of the whole case, I do not think it was such an error as calls for a reversal. I concur in the judgment.

65 Cal. 252

SCHUYLER v. BROUGHTON, Sheriff, etc. (No. 9,435.)

Filed May 20, 1884.

In an action to enjoin a sheriff from executing to a purchaser a deed of real property, alleged to belong to plaintiff, and to have been sold as the property of another person under an execution against him, the omission to aver in the complaint the existence of a judgment, under which such execution issued, is a fatal defect.

Department 1. Appeal from the superior court of Santa Barbara county.

B. F. Thomas, for appellant.

W. C. Stratton, for respondent.

BY THE COURT. The action is to enjoin defendant from executing to the purchaser a deed of certain real property, alleged to belong to plaintiff and to have been sold by defendant as property of plaintiff's husband. The defendant's demurrer to the complaint should have been sustained. The allegation that the deed, if executed, will be a cloud upon plaintiff's title is merely a legal conclusion. There is an allegation "that the defendant levied upon said real property under and by virtue of a writ of execution issued out of the superior court of the county of Santa Clara, in an action of Henry Miller, plaintiff, and W. H. Schuyler, defendant," etc. There is no averment that any judgment was ever rendered or entered in the action, *Miller v. Schuyler*.

A plaintiff asking a decree to enjoin the execution of a deed must allege facts showing that in an action of ejectment founded on the deed he would be required to offer evidence to overcome the effect of the deed. *Pixley v. Huggins*, 15 Cal. 127; *England v. Lewis*, 25 Cal. 337.

A sheriff has no general authority, as such, to sell any person's property. And although an execution, issued out of a court of competent jurisdiction, may protect him in an action of trespass brought by the judgment debtor, against whom the execution runs, for taking personal property, it will not protect him in an action brought by a third person, nor will it suffice to deraign title to real estate to the purchaser at the execution sale. A party in ejectment relying on a sheriff's deed must introduce not only the deed, but the judgment and execution by virtue of which the property was sold. *Quirk v. Falk*, 47 Cal. 453. The sheriff's deed is not admissible in evidence without first introducing the judgment, which is the authority for the sheriff to sell. *Vassault v. Austin*, 32 Cal. 597. An execution, without a judgment, gives the sheriff no authority to sell. *Jackson v. Hasbrouck*, 12 Johns. 213; *Smith v. Moreman*, 1 T. B. Mon. 154.

If the defendant here should execute the deed, the execution of which plaintiff seeks to enjoin, and an ejectment should be brought upon it, the deed and execution would not, in the absence of a judgment, compel the plaintiff to introduce any evidence.

It follows, therefore, that the omission to aver in the complaint the existence of a judgment is a fatal defect.

Judgment and order reversed, and cause remanded, with directions to the court below to sustain the demurrer to the complaint.

65 Cal. 250

BOLGER v. FOSS. (No. 8,003.)

Filed May 20, 1884.

By statute it is provided that "all roads, used as such for a period of more than five years, are highways." Legislatures have power to adopt enactments of this nature; there is no constitutional inhibition of such legislation.

The fact, as found, that the plaintiff placed gates at the points where the road entered upon and emerged from the land, which did not prevent the passage across it, does not overcome the effect of a finding that the road was used as a public road.

Department 1. Appeal from the superior court of Humboldt county.

S. M. Buck, for appellant.

W. H. Brumfield, for respondent

By THE COURT. The action is for an injunction to prevent defendant trespassing upon plaintiff's land, and for damages. The defenses are that defendant has a right of way through the plaintiff's lands; and that a highway or public road runs through them, upon which alone defendant has passed and threatens to pass.

"Prescription" is not a term strictly applicable to a right acquired by the public by the use of a way for any period of time. The law allows prescriptions only to supply the place of *grants*, and, inasmuch as the public cannot take by grant, the term "prescription," in its strict sense, has no application to highways. The true doctrine would seem to be that immemorial use by the public is evidence of a *dedication*, just as such use by an individual is evidence of a grant to him. Ang. Highw. § 131. But where there is a statute that roads shall be deemed public highways which have been used as such for a named period, the right of the public to continue to use them as public roads is fixed and established. Whether such statutes may be considered as creating or recognizing a rule of evidence, and to declare that the public use for the named time shall be conclusive

evidence of dedication, or rest on some other principle, their validity has not been doubted.

The court below found that, for more than 25 years prior to the commencement of this action, the road mentioned in the answer was used and traveled by the public as a public road; also that for more than six years the road had been used and traveled as a public road; and there was evidence to sustain the finding. Section 2619 of the Political Code provides: "All roads used as such for a period of more than five years are highways." This is more than a declaratory law to the effect that the fact of use of a road as a public road for more than five years shall be evidence *prima facie* or conclusive of dedication by the owners of the land through which it runs. It is in the nature of a statute of limitations, which gives to the public the right to use the road as a highway in case it has been so used. We know of no constitutional inhibition of such legislation. In New York there is a statutory provision to the effect that all roads not recorded, which have been or shall have been used as public highways for 20 years or more, shall be deemed public highways. 1 Rev. St. p. 521, § 100; 3d Ed. p. 696, § 120. Our attention has not been called to any decision in that state which questions the power of the legislature to adopt such enactment. Similar provisions of statutes have passed unchallenged in other states. The fact, as found, that in the fall of 1877 the plaintiff placed gates at the points where the road entered upon and emerged from this land, which did not prevent the passage across it, does not overcome the effect of the finding that the road was used as a public road; nor does the fact that plaintiff, a "short time" before he commenced this action, notified defendant that it was not a public road.

Judgment and order affirmed.

65 Cal. 259

SAWYER and others v. SARGENT. (No. 9,428.)

Filed May 20, 1884.

Insufficiency of the evidence to justify the judgment is not a statutory cause on which to base a motion for a new trial, nor can such motion be based on the ground that the judgment is against law; such motion should be directed at the decision, which consists of findings of fact and conclusions of law.

Where a statement, on motion for a new trial, is neither signed nor certified by the judge of the lower court, it will not be considered in the appellate court, and will be ground for reversal of an order granting a new trial thereon.

Department 1. Appeal from the superior court of San Diego county.

William M. Smith, for appellant.

Works & Titus, for respondent.

By THE COURT. The *decision* may be set aside and a new trial granted for certain causes. Code Civil Proc. §§ 656, 657.

The "decision" consists of findings of fact and conclusions of law. Id. §§ 632, 633. In the transcript before us the notice of intention to move for a new trial is: "The attorney for the plaintiff will take notice that the defendant intends to move the court to vacate and set aside the *judgment*, and to ask for a new trial, upon the following grounds: (1) Insufficiency of the evidence to justify the *judgment*, and that the judgment is against law; (2) errors in law occurring at the trial," etc.

Insufficiency of the evidence to justify the judgment is not a statutory cause on which to base a motion for a new trial, nor can such motion be based on the ground that the *judgment* is against law. The motion should be directed at the decision. *Martin v. Matfield*, 49 Cal. 42. As the proceedings leading to an application for a new trial are initiated only by a motion to set aside the *decision*, it follows that they cannot be commenced by notice of motion to vacate and set aside the judgment.

The statement on motion for new trial (so called) in the transcript cannot be considered by this court. It is not signed nor certified by the judge of the court below. Code Civil Proc. §§ 659, 660; *Smith v. Davis*, 55 Cal. 26.

The order granting a new trial must be reversed, because there was no notice or statement such as authorized the court below to act upon the motion. The order was not made by the court on its own motion. It does not purport to be such an order, but was made on the application of the defendant.

Order reversed.

(65 Cal. 258)

DOOLITTLE and others v. WOODCOCK and others. (No. 8,006.)

Filed May 20, 1884.

Where there is a substantial conflict of evidence, the order of the court granting a new trial will not be reversed.

It cannot always be presumed, where an objection to evidence as incompetent is overruled, that if the ruling had been against the offered evidence the party might not have proved the same fact by other evidence.

Department 1. Appeal from the superior court of Del Norte county.

L. F. Cooper, for appellants.

J. D. H. Chamberlain and E. Mason, for respondents.

By THE COURT. This is an appeal from an order granting a new trial, on motion of the plaintiffs. As there was a substantial conflict

in the evidence, we will not reverse the order of the court, the judge of which saw and heard the witnesses. It is urged by appellants that the order granting the new trial ought to be reversed, because the court improperly admitted certain documents offered by plaintiffs, to which defendants objected. The verdict of the jury was based upon the evidence which the court admitted, and the court below found that such evidence did not justify the verdict. It cannot always be presumed, when an objection to certain evidence as incompetent is overruled, but that if the ruling had been against the offered evidence the party might not have proved the same fact by other evidence.

Order affirmed.

65 Cal. 260

PEOPLE v. CASEY. (No. 10,963.)

Filed May 20, 1884.

The court, in charging the jury in a criminal case, may state the testimony and declare the law, but must not declare what the testimony shows; to judge of this is the exclusive province of the jury.

Certain instructions reviewed, and *held* erroneous.

In bank. Appeal from the superior court of Butte county.

A. W. Gale and *J. Robinson*, for appellant.

The Attorney General, for respondent.

SHARPSTEIN, J. It appears by the record that the court commenced its charge to the jury by the statement that the defendants were charged with the crime of burglary, and then read the statutory definition of the crime. At the request of defendants' counsel, the court instructed the jury that, "unless you [the jury] find that the defendants, at the time they entered the house referred to, had in their minds the intent to commit larceny, you must find them not guilty. To constitute a crime there must be a union of evil intent and evil act." Some other instructions were given, after which the court gave the following: "The testimony in the case shows that the defendants, after they had taken the property to Thompson's, and as Thompson stated, endeavored to dispose of it; that they denied ever having seen the property before." This is in clear violation of that clause of the constitution which declares that "judges shall not charge juries with respect to matters of fact, but may *state the testimony* and declare the law." To *state* the testimony is one thing; to declare what it *shows* is another and very different thing. It is for the jury, exclusively, to determine what the testimony *shows*.

After the jury had been out four hours they returned into court and requested further instructions. The court then instructed them that "Walbridge testified that the quilts were his, and were in the Union hotel the day before they were missed." The court was in error. Walbridge so testified as to one of the quilts only. He said he could not swear to the other two; they looked like the ones he had; he could not swear to them. If it were clear to our minds that this error could not have prejudiced the defendants, we might disregard it; but, as we view the case, they may have been prejudiced by it. If all three of the quilts had been positively identified by Walbridge as his, and as having been in his hotel, the evidence would be somewhat stronger against the defendants than it now is. As the case now stands, it does not positively appear to whom two of the quilts belonged, or that they were taken from the house of Walbridge. Therefore, the testimony of Walbridge, as stated by the court, is somewhat stronger against the defendants than it was as given by Walbridge. The court at the same time instructed the jury that "if the defendants took the quilts between sunset and sunrise they committed burglary in the first degree." The only question which can arise in regard to this is whether the jury must not be presumed to have understood by it that if the defendants entered the house mentioned in the indictment between sunset and sunrise, and stole the quilts mentioned in the indictment from said house, they committed burglary in the first degree; in other words, that the jury connected this instruction with those which had been previously given. Possibly they did; but we cannot base a presumption on a bare possibility. The court made no reference to anything which had gone before. The instruction as given is without qualification, and we think it would be unsafe to assume that the jury understood it otherwise. If the court had instructed the jury that "if the defendants entered the house between sunset and sunrise they committed burglary in the first degree," the same presumption might be invoked to sustain it. It might then be said that the jury must be presumed to have supplied the defects and omissions by the same process which it is claimed they supplied those in the instruction excepted to.

These constituted the only substantial errors disclosed by the record as we view it.

Judgment and order reversed.

We concur: MCKINSTRY, J.; THORNTON, J.; MORRISON, C. J.

ROSS, J. I concur in what is said by Mr. Justice SHARPSTEIN in regard to the first instruction set out in his opinion, and in the judgment.

2 Cal. Unrep. 314

In re ESTATE OF FEELEY, deceased. (No. 7,953.)

Filed May 20, 1884.

Evidence *held* insufficient to justify the decision and findings.

Department 1. Appeal from the superior court of Santa Cruz county.

This was a proceeding for the settlement of the account of the executor of this estate. Objections were filed to said account, and thereafter the court duly settled such account. From such settlement, and the orders and findings thereon, the executor appeals.

W. D. Story and Moore, Laine & Johnston, for appellant.

Z. N. Goldsay and J. A. Barham, for respondent.

By THE COURT. Appellant urges that the court found, against the evidence, that the executor was to be charged with $17\frac{3}{4}$ acres of land, "a little more or less;" that the court finds, and "there is no dispute," that Pagels bought the two-acre piece; that one acre was washed away without the fault of the executor; and that "there was no dispute" but the railroad purchased four and one-half acres. But the court found that Pagels bought the one-acre tract, "a little more or less," and the executor swore: "I received \$180 from Pagels for the *one acre*, sold by order of the court." Take from the 23 acres, of which deceased was seized at his death, the one acre sold to Pagels, the one acre washed away, and the four and one-quarter acres sold to the railroad company, and there would remain $16\frac{3}{4}$ acres. The specification of insufficiency of evidence in the statement, on motion for a new trial, is to the effect that the executor should not be charged with a greater quantity of land than $16\frac{3}{4}$ acres; and the statement for new trial avers that there was evidence "showing" that there was left "in the hands of the executor" $16\frac{3}{4}$ acres. It would seem, therefore, that the court should have found $16\frac{3}{4}$ instead of $17\frac{1}{2}$ acres as being all the land remaining in possession of the executor. But while the court found that of the 20-acre tract 1 acre had been washed away and $4\frac{1}{2}$ acres had been sold to the railroad in 1874,—leaving of that tract $14\frac{1}{2}$ acres,—it charged the executor with the rental value of $17\frac{3}{4}$ acres of the 20-acre tract from June, 1871, and *also* charged him with the value of the use of the two-acre tract for a portion of the same time.

There is no finding as to the \$170 alleged to have been stolen from the executor, nor as to the item of *about* \$25 contested.

The interests of justice demand a new trial of the issue. Order reversed and new trial granted.

65 Cal. 257

BROUGHTON v. COUNTY OF SANTA BARBARA. (No. 9,481.)

Filed May 20, 1884.

A sheriff, in serving a warrant of arrest, is entitled to mileage for traveling in going only, and not for traveling in different directions in looking for a person charged with crime, who is not arrested.

Department 1. Appeal from the superior court of Santa Barbara county.

John J. Boyce, for appellant.

W. C. Stratton, for respondent.

By THE COURT. The action is brought by the sheriff to recover \$321.30, as "mileage" for traveling "to serve warrant of arrest" on one charged with felony. Plaintiff relies upon the provision of the statute which reads as follows:

"For every mile necessarily traveled, in going only, in executing any warrant of arrest, subpoena, or venire, bringing up a prisoner on *habeas corpus*, taking prisoners before a magistrate or to prison, or for mileage in any criminal case or proceeding: provided, that in serving a subpoena or venire, when two or more jurors or witnesses live in the same direction, but one mileage shall be charged, thirty cents: provided further, that in the counties of Amador and Sacramento, for every mile necessarily traveled in any criminal case, twenty cents." St. 1869-70, p. 159.

The clause in the section, "or for mileage in any criminal case or proceeding," does not authorize the sheriff to charge mileage for other traveling than that which is expressly mentioned in the statute, but simply fixes the rate which may be charged when mileage is allowed by any other law or statute. Thus, if there be any other service for which a statute requiring it to be performed does not fix the compensation, but which involves traveling, the sheriff may charge for such traveling, "in going only," 30 cents a mile.

In *Ex parte Wyles*, 1 Denio, 658, BEARDSLEY, J., said:

"The rule is probably without exception, that no fees are allowed to any officer for traveling, in order to serve process, unless the service is actually made. I think the principle is entirely settled, and it is, moreover, one of sound policy. It excites to vigilance and fidelity, whereas the opposite rule would afford a strong temptation to remissness and fraud."

Certainly, the intent of the legislature, after having carefully stated that the sheriff shall receive mileage at a certain rate "in going only," when a warrant is executed, to allow mileage for traveling in different directions in looking for one charged with crime who is *not* arrested, should be very clearly expressed. But, as we have seen, the clause of the statute relied on will support another and equally plausible interpretation.

Judgment reversed.

Cal.Rep. 1-4 P.—30

65 Cal. 263

ROBINSON *v.* PLACERVILLE & S. V. R. Co. (No. 9,118.)

Filed May 20, 1884.

Evidence *held* sufficient to justify the findings.

If certain facts in an answer constitute a defense, it is no objection that other facts be stated, even though they do not constitute any cause of defense.

A plea of payment is sustained by evidence showing that the debt has been paid, satisfied, and discharged. A technical payment need not be proven.

A third person may buy in claims against a debtor for less than their face value, for the benefit of the debtor.

Where the result would have been the same if a finding had been in favor of a party, he cannot complain of failure to find on certain issues.

A plaintiff will not be permitted to dismiss his action after filing of an answer claiming affirmative relief.

Certain depositions *held* admissible.

In bank. Appeal from the superior court of the city and county of San Francisco.

The plaintiff in this action alleged that he was the owner of certain bonds of the defendant corporation, which bonds were secured by a mortgage of its property. He charged the trustees of the corporation with abandonment of their trust, and neglect of the interest of the bondholders, and prayed their removal and the appointment of new trustees. The defendant denied the validity of the bonds and mortgage, and alleged that after the execution thereof the defendant corporation executed and delivered to Wells, Fargo & Co. a promissory note secured by a deed of trust on its property; that L. L. Robinson, and not the plaintiff, was the owner of the bonds aforementioned, and that said L. L. Robinson, together with plaintiff and others, agreed with said Wells, Fargo & Co. that as the validity of the first bonds and mortgage had been questioned, the latter should foreclose their mortgage, purchase the road at foreclosure sale, form a new company, and pay to the bondholders their interest by shares of stock in the new company; that this agreement was consummated by one Alvord purchasing the road as trustee for the creditors of the company at the foreclosure sale, certificates of such stock in the new company were delivered to said Robinson for his interest, and defendant claims that the old bonds were thereon surrendered and canceled, and thereby paid, satisfied, and discharged. Thereafter the road was sold, and certain sums of money were paid in "further satisfaction and payment" of said bonds and coupons to said L. L. Robinson. Defendants further alleged that in consequence of the surrender of said bonds, and the acceptance of said sums of money as payments, the bonds were fully satisfied and discharged; and, further, that if the same were not canceled and discharged, then there was still in the hands of said L. L. Robinson the sums of money last mentioned; in which case defendant prayed that L. L. Robinson be made a party to this suit, and that an accounting be made of such moneys. In the

course of the proceedings the parties stipulated that certain depositions were regular and in proper form, and might "be read by either party" on the trial, etc. Plaintiff, on the trial, objected to the admission of certain of these depositions, claiming that such stipulation was only as to the form of such depositions. The trial court admitted them under the stipulation notwithstanding the objection.

Edward J. Pringle, for appellant.

Cope & Boyd, for respondent.

By THE COURT. 1. It would seem to be the theory of plaintiff, the appellant, that the conveyance by *Alvord* transferred only the title acquired through the decretal sale based upon the foreclosure of the second mortgage; that is, the title of defendant subject only to the lien of the prior mortgage. Inasmuch as the original scheme fell through, by reason of the failure effectively to organize a new corporation, it may, for the purposes of this decision, even be conceded that Wells, Fargo & Co., the second mortgagee, would have been entitled to receive the whole consideration for the conveyance of the *Alvord* title, except for the agreement with respect to its distribution entered into between Wells, Fargo & Co. and the agent of plaintiff. The testimony of plaintiff's brother is clear to the point that a large portion of the consideration for the *Alvord* title was paid to him, with the consent of Wells, Fargo & Co., to be by him appropriated in the proportions stated in the circular of Wells, Fargo & Co., to the payment and satisfaction of such of the currency bonds of defendant as should be surrendered for cancellation. A portion of the consideration was in fact paid to the witness on his promise to apply the same to the taking up of the currency bonds. Of the money so received the witness paid to plaintiff a sum at least equal to the percentage or proportion to be paid for the surrender of the bonds claimed by him. True, the witness testifies that in his opinion the agreement between himself and Wells, Fargo & Co. "was not binding on anybody," and that plaintiff refused to take the money for his bonds. But the witness and plaintiff, each in turn, *took the money*,—the latter with full knowledge of all the facts, and with notice that the agreement with Wells, Fargo & Co. was binding on the witness, because he received the money (having otherwise no claim to it) with the distinct understanding that it should be applied to the satisfaction of defendant's bonds. We think the court below was fully justified in reaching the conclusion, upon the testimony of plaintiff's brother alone, that plaintiff received the money for, and in consideration of, the surrender and cancellation of his bonds. But there was evidence not only that plaintiff, by his agent, receipted for his proportionate number of shares of the new corporation, but that he actually surrendered his bonds to Wells, Fargo & Co. Further, that

when the arrangement was made whereunder a portion of the consideration for the sale of the *Alvord* title was to be paid the brother of plaintiff, to be by him distributed among the holders of such of the currency bonds as should be surrendered for cancellation, the bonds here sued for, with others, were delivered to him for the purpose of enabling him to make out a statement of the several sums to be paid to the respective holders of blocks of currency bonds, with the understanding and agreement that they should be returned to Wells-Fargo to be destroyed when they were taken up by payment of the money.

2. Counsel for plaintiff has ingeniously separated the answer of defendant into parts; calling one portion a plea of "accord and satisfaction," and another portion a plea of "payment." But the suit is in equity, and the facts on which defendant relied were proved by testimony to which objection was not taken. The meaning of the answer is sufficiently plain. The defendant relied upon an alleged surrender of the bonds sued on by the owner of them, and an acceptance by him of stock in the new corporation, and also upon the acceptance, by the owner of such bonds, of moneys, part of the proceeds of the sale of the *Alvord* title, for his bonds. If it be conceded that defendant was mistaken in supposing the surrender of the bonds for stock of the new corporation to have satisfied the bonds, (because of failure in the organization of the new corporation,) and was mistaken in supposing that the acceptance of the distributive share of the proceeds of the *Alvord* title was in "further" and not in *entire* satisfaction of the bonds, these supposed erroneous conclusions of law on the part of defendant do not affect the legal consequences of the facts alleged in the answer. If the last fact stated constituted a defense, it is no objection that the first is also stated; indeed, they were so far connected that an intelligent appreciation of the relations of the parties is facilitated by a recital of both.

3. It is urged that the plea of "payment" is not sustained by the evidence, because a part payment could not legally operate to extinguish plaintiff's bonds. The answer does not allege a technical "payment" by defendant, but that the bonds were *paid, satisfied, and discharged*, as the result of the facts averred. If the bonds were to be returned to Wells, Fargo & Co. upon the acceptance by plaintiff of a distributive share of the proceeds of the *Alvord* sale, to be destroyed by Wells, Fargo & Co., they were, in effect, to be assigned to that corporation, which was to receive them as assignee, subject to the trust that they should be destroyed for the benefit of defendant. Defendant was authorized to assert its beneficial interest in the contract between plaintiff and Wells, Fargo & Co., and we know of no equitable principle which would inhibit a third person from buying in claims against a debtor, for less than their face value, for the benefit of the debtor.

4. Appellant says the findings are insufficient, because there is no finding as to the ownership of the bonds. But it is alleged in the

complaint that the bonds herein named belonged to plaintiff. It may be conceded that a finding on that issue must have been in favor of plaintiff. No injury was done plaintiff by the failure to find on the issue, because the result would have been the same if the finding had been in his favor.

5. The answer claimed affirmative relief, and the plaintiff was not authorized to dismiss his action. Code Civil Proc. 581.

6. The depositions were admissible under the stipulation. Judgment and order affirmed.

65 Cal. 280

HIGGINS v. PARSONS. (No. 8,035.)

Filed May 27, 1884.

Where, through fraud or mistake of one party, which the other knew or suspected, a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to truly express such intention, so far as can be done without prejudice to the rights acquired by third parties, *bona fide* and for value, and without regard to the fact that the party seeking the relief might have discovered the mistake before signing the contract.

Findings held inconsistent with each other and with the evidence.

Department 2. Appeal from the superior court of Mendocino county.

This was an action to reform a written instrument. On the trial special issues were submitted to the jury, among them issues 6, 7, and 8, mentioned in the opinion, which were on the questions as to whether the plaintiff had endeavored to inform himself of the contents of the instrument, and whether any false representations had been used to induce him to sign the instrument, which issues the jury answered in the negative. Judgment having been rendered for defendant, the plaintiff moved for a new trial, relying on certain assignments of error, including those mentioned in the opinion. These latter were rulings on the admissibility in evidence of certain questions. A new trial having been denied, plaintiff appealed. The other facts are stated in the opinion.

J. A. Cooper, for appellant.

T. L. Carothers and *T. B. Bond*, for respondent.

SHARPSTEIN, J. The court found that in a verbal agreement made prior to the execution of the written instrument which this action was brought to have reformed, "it was stipulated that the defendant should pay plaintiff interest on \$7,000 at the rate of 1 per cent. per month," and that the plaintiff believed, at the time of signing said instrument, that it contained that stipulation, and that defend-

ant knew, at the time of signing said instrument, that it did not contain that stipulation, but did contain one that defendant should pay interest at the rate of 1 per cent. per annum.

The complaint alleges a mistake in the particular above specified, and the answer denies it. That was the sole issue in the case. But the court found that said written agreement differed from said verbal agreement in several other essential particulars. Neither party so alleged, and neither asked to have said written instrument reformed in any other than the particular above specified. We must therefore presume that both were satisfied with it in all respects other than that specified in the pleadings. It is also found that the defendant would not have signed said instrument if it "had contained a stipulation to pay interest at the rate of 1 per cent. per month on \$7,000." But he knew that he had agreed to pay that rate of interest, and knew that the plaintiff supposed when he signed said written instrument that it contained that agreement. Under such circumstances we think it quite immaterial what the defendant would or would not have done if the instrument had expressed the real agreement of the parties. If it omitted something which the defendant thought had been agreed to, he was at liberty to refuse to sign it. But, be the fact as it may, it furnishes no ground for denying the relief prayed by plaintiff. It does not appear that the defendant supposed, or had any reason to suppose, that the instrument as drawn was satisfactory to plaintiff. The defendant knew that the written instrument did not truly express the agreement of the parties, and knew that, in the only respect in which it is sought to have it reformed, the plaintiff, at the time of signing it, supposed that it did truly express said agreement. This constituted "a mistake of one party, which the other at the time knew or suspected," and the party aggrieved is entitled to have the instrument revised so as to express the real intention of the parties.

The finding that plaintiff might have discovered the mistake, which he seeks to have rectified, is an immaterial one. The right to have an instrument revised, so as to have it truly express the intention of the parties, is not made to depend on the fact whether the party seeking to have it so revised might have discovered the mistake before signing such instrument. The language of the Code is:

"When, through fraud or a mutual mistake, *or a mistake of one party, which the other knew or suspected*, a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to express the intention, so far as it can be done without prejudice to rights acquired by third persons in good faith and for value." Civil Code, § 3399.

The conditions on which relief may be granted are clearly specified, and we are not at liberty to exact others.

The finding "that the defendant never made the contract by which it is sought to bind him in this action," is inconsistent with the find-

ing "that, in a verbal agreement made prior to the execution of said written instrument, it was stipulated that defendant should pay plaintiff interest on \$7,000 at the rate of 1 per cent. per month." It is not sought by this action to bind defendant to perform anything more than that.

We think the rulings of the court, specified in the plaintiff's assignments of error, from 1 to 6, inclusive, were erroneous. According to the views hereinbefore expressed, the special issues, Nos. 6, 7, and 8, submitted to the jury, were wholly irrelevant.

Judgment and order reversed.

We concur: THORNTON, J.; MYRICK, J.

65 Cal. 271

REDMAN v. PURRINGTON. (No. 7,827.)

Filed May 27, 1884.

Where several promissory notes are executed, together with a mortgage to secure their payment, in the absence of any special agreement to the contrary, an assignment of one of the notes will carry with it a *pro rata* interest in the security; and a covenant in the mortgage that in default of payment of interest foreclosure suit might immediately be brought, inures to the benefit of either of the assignees.

Department 1. Appeal from the superior court of Sonoma county.

W. D. Bliss, for appellant.

E. S. Lippitt and Haskell & Farquer, for respondent.

Ross, J. Four several promissory notes, together with a mortgage to secure their payment, were executed by T. F. Purrrington to one Sutton. One of the notes was for \$1,500, payable three months after date; another was for \$1,000, payable one year after date; another was for \$1,000, payable two years after date; and the fourth was for \$3,000, payable three years after date. The \$1,500 note was paid. The \$3,000 note was sold and assigned by Sutton to plaintiff for value, he (Sutton) retaining the \$1,000 notes. In the absence of any special agreement to the contrary, the assignment, under such circumstances, of the \$3,000 note would have carried with it a *pro rata* interest in the security. *Grattan v. Wiggins*, 23 Cal. 30; *Jones, Mort.* § 822. But in this case the finding is that it was expressly agreed between Sutton and the plaintiff that the assignment of the \$3,000 note should carry with it a *pro rata* interest in the mortgage, and of the fact of the assignment of the \$3,000 note Kenyon was aware at

the time of his subsequent purchase from Sutton of the two \$1,000 notes.

The mortgage contained the covenant:

"In case default be made in the payment of either principal or any installment of interest, as provided, then the whole sum of principal and interest shall be due at the option of the party of the second part, (the mortgagee,) and suit of foreclosure may be brought immediately."

This covenant inured to the benefit of the assignees of the mortgagee, and, as the interest upon the \$3,000 note was not paid as provided, and the plaintiff thereupon elected to consider the principal sum, as well as interest, due, the suit was well brought.

Other points made do not require special notice.

We think the judgment right. Judgment and order affirmed.

We concur: MCKINSTRY, J.; MCKEE, J.

2 Cal. Unrep. 315

PEOPLE v. ELSTER. (No. 10,933.)

Filed May 27, 1884.

The conduct, acts, and statements of a person under arrest for a crime which he is charged with having committed, are admissible in evidence, and such inference may be drawn from them as are warranted by the evidence; but an inference of guilt cannot be drawn from a statement evincive of innocence, nor from silence, where a person is not bound to speak, nor from refusal to answer unauthorized questions touching the charge against him.

When a man in whose possession stolen property is found gives an account of how he came by it, as by telling the name of the person from whom he received it, it is incumbent on the prosecution to show that the account is false, unless the account given be unreasonable or improbable on the face of it.

While it would be proper, in a case in which there is any evidence tending to prove inculpatory facts and circumstances in connection with the possession of property recently stolen, for a court to instruct the jury that they will be justified in finding the defendant guilty of the theft, it would be improper and erroneous to give such instructions if there were no evidence in the case to warrant the inference of such circumstances.

Department 1. Appeal from the superior court of Stanislaus county.

Wright & Hazen, for appellant.

The Attorney General, for respondent.

MCKEE, J. In this case the defendant was convicted of grand larceny. He moved for a new trial. The motion was denied, and from the judgment of conviction and the order denying a new trial he has appealed.

The larceny is charged to have been committed on Sunday, April 1, 1883. It consisted of the stealing of a calf from the custody of its alleged owner. The principal evidence connecting the defendant with the offense was the discovery of the hide of the calf in the shop of a butcher, to whom the defendant had fetched and sold it early on the morning of April 2, 1883. At the trial the defendant attempted to account for the possession, but it was contended the account was false. The question, therefore, of the guilt or innocence of the defendant depended upon the possession by him of the property soon after it was alleged to have been stolen, and the circumstances in connection with its possession and sale. Assuming that the calf belonged to the person named in the information as the owner, and that it had been stolen from him, yet the mere possession of recently stolen property, standing alone, and unconnected with other facts and circumstances tending to prove guilt, is not, of itself, sufficient in law to warrant a conviction; it is merely a circumstance tending to implicate the accused; but, if linked with other facts and circumstances also tending to implicate him, it may amount to direct and positive proof. *People v. Beaver*, 49 Cal. 57; *People v. Getty*, Id. 581; *People v. Chambers*, 18 Cal. 388; *People v. Ah Ki*, 20 Cal. 177; *People v. Gassaway*, 23 Cal. 51; *People v. De Lacey*, 28 Cal. 590; *People v. Noregea*, 48 Cal. 123. To that extent the court properly explained the law to the jury; but in connection with that explanation it instructed them as follows:

"If you believe from the evidence, beyond a reasonable doubt, that the defendant refused to give any explanation of the fact of possession, or attempted to dispose of the property, or to destroy its marks, these facts, if you find them to exist, or any other circumstances naturally calculated to awaken suspicion against him, and to corroborate the *inference of guilty possession*, will, in connection with the fact of recent possession, justify you in finding the defendant guilty."

This instruction was followed by others to the effect that if the jury believed that the calf was stolen, and was very soon afterwards found in the defendant's possession, the fact "that the defendant failed or refused, when asked, to account for the possession in an honest manner, or to show that such possession was honestly obtained," or "refused or neglected to give any explanation of his possession, was a circumstance which, in connection with the fact of his possession, and in connection with any other facts or circumstances which would be calculated to awaken suspicion against him and to corroborate the inference of guilty possession, would justify them in finding the defendant guilty."

The only evidence in the record for the assumption of the fact that the defendant, when asked, failed, or refused, or neglected to give any explanation of his possession of the property, is this: After the defendant had been arrested, and was in the custody of the officers who arrested him, on the way to the examining magistrate, he in-

quired of the officer if he was arrested for an animal which had been sold to Tranor, (the butcher at whose shop the hide of the calf had been found,) admitting that he had sold some beef there; and then the officer said to him, "You have got no cattle of your own, have you?" to which he replied, "He had not." "I then," continued the officer, testifying, "asked him where he got the cattle or beef which he sold? He said he did not understand the law, and he did not think it was best for him to say anything about it; that the less he talked about it the best, as long as he didn't understand the law. I told him the first thing I would do if I was charged with having in my possession property that there was a question about the title, would be to tell where I got it. He said he did not understand the law, and did not propose to say much about it; didn't understand anything about the law. He said *that* beef that was sold to Tranor was straight—nothing wrong about it."

It is well settled that the conduct, acts, and statements of a person under arrest for a crime, which he is charged with having committed, are admissible in evidence against him, and such inferences may be drawn from them as are warranted by the evidence, considered in the light of human experience. But an inference of guilt cannot be drawn from a statement evincive of innocence, nor from silence, where a person is not bound to speak, nor from refusal to answer unauthorized questions touching the charge against him, which, under the circumstances, called for no reply. Code Civil Proc., §§ 1958, 1960. A person accused of crime is under the protection of the law. He is not bound to assert his innocence to an officer who arrests him, nor to answer questions asked by the officer as to the crime for which he is arrested, or any circumstances connected with it. Under such circumstances the accused has the right to be silent, or to assign the reason why he, at that time, declines to enter into explanations. If he keeps silence or refuses to answer "because he does not understand the law, and had better not say anything," no inference from his silence or refusal can be drawn against him. 1 Greenl. Ev. §§ 197, 199; *People v. McDermott*, 123 Mass. 440; *Gale v. Lincoln*, 11 Vt. 152.

Now neither statement made by the defendant, that "the sale by him of the beef to Tranor was all straight, and there was nothing wrong about it," nor his refusal to answer the questions which were asked by the officer, warranted the inference of an implied admission of guilt. As the statement was in itself evincive of innocence and not of guilt, and the refusal was the exercise of a legal right, it was erroneous for the court to assume them as circumstances upon which to predicate instructions that the possession of the defendant was a "guilty possession." If such an inference could be drawn at all from the conduct or statements of the defendant, it was for the jury to draw it; they only could determine whether the conduct of the defendant, on the occasion of his arrest, was contrary to the ordinary be-

havior of a person charged with crime, or attributable to his mental characteristics, or evinced guilt or innocence. *Greenfield v. People*, 85 N. Y. 86. It was not for the court. *People v. Ah Sing*, 59 Cal. 400.

Of many of the other circumstances upon which the instructions were predicated we find no evidence in the record. The record discloses that the defendant did not fail or refuse to explain or account for his possession of the property. At the trial of the case direct evidence was given tending to prove that the calf belonged to one Fagan, a farmer and cattle-owner; that Fagan killed it the Sunday evening when it was charged to have been stolen, on a range where his cattle pastured, in common with cattle belonging to the person named in the information as the owner, and others; that, after killing it, he, with his son, took out the entrails of the calf, at the place on the range where it was killed, cut off its head and feet, as was customary in killing an animal for market, and took it, with the assistance of the defendant, who was his hired man, to his farm-house, where he kept it through the night, and sent it next morning, by the defendant, for sale to the butcher; that it was sent by the defendant, for that purpose, early in the morning, because the butcher had requested that any animal sent for sale should be sent early in the morning, before he went to supply his customers. The defendant himself also testified, as a witness in his own behalf, that his connection with the possession of the calf was only that of a hired man, acting under the orders of Fagan, who claimed to be the owner of the calf, and who, he believed, was the owner. Now, this account was either true or false. If true, the possession by the defendant was not a "guilty possession," whether the calf belonged to the person named in the information, or to Fagan. No presumption of guilt could arise against the defendant from a mere possession of property received from his master for the purpose of selling it; nor could an inference of guilt be drawn against him, unless the account given of the possession was unreasonable or improbable on its face. If neither unreasonable nor improbable, then the possession was accounted for. It was not a guilty possession unless it was proved, or it might be fairly presumed, that the account or explanation given of it was false. "It is a general principle," says Mr. Justice ALDERSON, "that when a man, in whose possession stolen property is found, gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, it is incumbent on the prosecution to show that the account is false, unless the account given be unreasonable or improbable on the face of it." *Roscoe*, Crim. Ev. 21.

After the defendant had accounted for the possession, it was for the jury to determine whether the account given was reasonable or improbable, true or false. But, whether the account was one or the other, it did not warrant the assumption upon which to predicate instructions to the jury that the defendant had failed or refused or

neglected to account for the possession at all. Neither of these things could be assumed of the conduct or statement or explanation of the defendant, as given in evidence; and it is well settled that facts and circumstances upon which instructions are predicated must be founded upon the evidence in the case. If there be no evidence tending to prove them, it is error for the court to assume them, or to so word instructions with reference to them as to leave it to the jury to infer their existence. While, therefore, it would be proper, in a case in which there is any evidence tending to prove inculpatory facts and circumstances in connection with the possession of property recently stolen, for a court to instruct the jury that they will be justifiable in finding the defendant guilty of the theft, it would be improper and erroneous to give such instructions if there were no evidence in the case to warrant the inference of such circumstances. Instructions should only be given with reference to a fact or state of facts in evidence; otherwise they are mere legal abstractions, inapplicable to the case, and calculated to mislead the jury, (*People v. Turley*, 50 Cal. 469; *People v. Vasquez*, 49 Cal. 562; *People v. Sanchez*, 24 Cal. 17; *People v. Best*, 39 Cal. 690;) and, in giving them, comments on the testimony produced should not be made; nor should they contain expressions upon the weight and sufficiency of the evidence; nor strong expressions as to the guilt of the accused. Such expressions, coming with the weight of authority, are calculated to bias the minds of the jurymen, and may impair the right of the accused, guarantied by the constitution, to a trial of the issues of fact by an impartial jury. *People v. Williams*, 17 Cal. 142; *People v. Ah Sing*, 59 Cal. 400; *People v. Mitchell*, 55 Cal. 236; *People v. Levison*, 16 Cal. 99; *People v. Walden*, 51 Cal. 588; *People v. Wong Ah Ngow*, 54 Cal. 152; *People v. Carrillo*, Id. 63; *People v. Fielen*, 58 Cal. 218; *People v. Graham*, 21 Cal. 262; *People v. Atherton*, 51 Cal. 495.

Fagan, a witness called by the defendant, was examined, and gave material evidence in the case. On his cross-examination the district attorney asked the following questions, viz.: "Have you ever been arrested for a felony? Have you been arrested for stage-robbing? Have you been arrested for cattle-stealing?" The witness was compelled to answer each question, against the exception of the defendant. The only possible object of asking the questions was to impeach the credibility of the witness. But the testimony was not admissible for that purpose. The mere fact that the witness had been arrested does not prove nor tend to prove that he had been convicted of any offense; and until there is proof of conviction the witness was protected by the legal presumption of innocence. Hence the rule formulated by section 205, Code Civil Proc.: "A witness may be impeached by the party against whom he was called, by contradictory evidence that his general reputation for truth, honesty, and integrity is bad, but not by evidence of particular wrongful acts, except that it

may be shown by the examination of the witness, or the record of the judgment, that he has been *convicted* of a felony." *People v. Chin Mook Sow*, 51 Cal. 597; *People v. Reinhart*, 39 Cal. 449; *People v. McDonald*, Id. 697; *People v. Snellie*, July term, 1871.

It follows that the foregoing rulings and instructions of the court were erroneous.

Judgment and order reversed, and cause remanded.

We concur in the judgment: MCKINSTRY, J.; ROSS, J.

65 Cal. 273

CORREIO v. LYNCH. (No. 8,107.)

Filed May 27, 1884.

It is only where an article is manufactured under an order for a particular purpose, that the manufacturer by the sale warrants that it is reasonably fit for that purpose.

Where the object of the sale is delivered to the vendee, and accessible to his examination before he uses it or pays for it, and it is not of the quality which the vendor agreed to deliver, he may either refuse to accept it, or may accept and use it, and pay only the real value for it.

Department 2. Appeal from the superior court of Marin county.

Charles F. Hanlon, for appellant.

Joseph Kirk, for respondent.

SHARPSTEIN, J. The action being for the price and value of wood, defendant, under the general denial, might have shown that the wood was not of the value alleged in the complaint. He aimed, however, at something beyond that, and attempted to establish a case which would entitle him to "a fair compensation for the loss incurred by an effort in good faith to use it," for the purpose of burning bricks in a kiln, on the ground that plaintiff warranted the fitness of said wood for that particular purpose. Civil Code, 3314. There is no allegation in the counter-claim of an *express* warranty to that effect; and it is only where an article is manufactured "*under an order for a particular purpose*," that the manufacturer, "*by the sale*, warrants that it is reasonably fit for that purpose." Id. 1764, 1770. Fire-wood is not, in our opinion, a manufactured article, within the meaning of the Code; no more so than grain or wool. Therefore, the defendant could not recover compensation for the loss which he incurred by his efforts to use said wood for the purpose of burning bricks. And he cannot complain of the rulings of the court by which evidence tending to prove the loss incurred by such efforts was excluded.

The evidence of the defendant is that the plaintiff commenced delivering the wood at defendant's brick-yard three or four months before there was any occasion for using it, and if it was not of the quality which plaintiff had agreed to deliver, it was optional with defendant to refuse to accept it, or to accept and use it; and, in the latter event, pay only its real value. It is not the case of one selling merchandise *inaccessible* to the examination of the buyer. *Id.* 1771. Here the wood was delivered on defendant's premises, and accessible to his examination before he used it or paid for it. In fact it is not claimed that he has ever paid anything for it. Under such circumstances he cannot avoid the payment of its real value.

It is stated in the bill of exceptions that the "plaintiff introduced evidence in support of the allegations in his complaint, and the defendant introduced evidence denying the same." The exceptions to the rulings of the court on the defendant's attempts to introduce evidence in support of that part of the answer denominated a counterclaim, and the refusal of the court to give instructions based on the theory that the defendant was entitled to compensation for such loss as he might have suffered by his efforts in good faith to use said wood for the purpose of burning bricks, are the only ones which we have to consider. We think none of them are well taken.

Judgment and order affirmed.

We concur: THORNTON, J.; MYRICK, J.

65 Cal. 283

CITY OF LOS ANGELES *v.* WALDRON. (No. 9,257.)

Filed May 27, 1884.

In a proceeding to condemn property for the use of a city, it is not necessary to allege that the property sought to be condemned was necessary for some municipal or public use; the question of the necessity existing at the time of the passage of an ordinance therefor was for the council to determine, and its determination is made manifest by the passage of the ordinance.

In pleading the existence of an ordinance, the complaint, in stating that the council "duly passed and adopted it," is sufficient as stating, in legal effect, that everything necessary to be done by the council, or under its direction, to give it validity, had been done, without stating each particular thing or act.

Doing an act by ordinance is equivalent to doing the same act by resolution.

In bank. Appeal from the superior court of Los Angeles county.

W. B. Stephenson, for appellant.

John F. Godfrey, for respondent.

By THE COURT. It is insisted on behalf of the respondents that the demurrer to the petition was properly sustained,—

First. Because it is not alleged that it is necessary to take the property sought to be condemned for any municipal or public use. It is alleged "that the council of said city, on the fourth day of November, 1882, duly passed and adopted an ordinance in writing," directing proceedings to be taken to condemn certain property of the respondents for the purpose of widening Main street, between Washington and Adams streets, and "that it is now necessary to condemn said land for public use, agreeably to the provisions of said ordinance." We think this a sufficient allegation of the necessity of taking the land referred to for public use. The question as to the necessity existing at the time of the passage of the ordinance was for the council to determine, and its determination is manifest from the passage of the ordinance.

Second. Because it is not alleged that the ordinance was signed by the clerk or mayor, (or, if signed by the latter, passed by a four-fifths vote,) was not published in a paper published in Los Angeles, and was not published in English. By the charter of Los Angeles, all these things were necessary to be done in order to give the proposed ordinance any validity; therefore, under section 456, Code Civil Proc., in pleading the existence of the ordinance, the complaint, in stating that the council "duly passed and adopted" it, is sufficient as stating, in legal effect, that everything necessary to be done by the council, or under its direction, to give it validity, had been done, without stating each particular thing or act.

Third. Because the ordinance provides that "if, within twenty days from the publication of this ordinance, the owners of property fronting along Main street, or cross streets forming a junction therewith, within the limits to be assessed, amounting to two-thirds of said frontage, shall make and file with the clerk of the council a written remonstrance against said proposed improvements, thereupon the same shall not be further proceeded with." The objectionable words are, "or cross streets forming a junction therewith." In the preceding section (2) the council had declared that "the assessment for the payment of the damages sustained by reason of said improvements shall extend on both sides of Main street, from Washington street to Adams street." By section 3 it was only the owners of property *within the limits to be assessed* who were authorized to remonstrate, and those limits were prescribed by section 2. This appears to us to be sufficiently certain.

Fourth. Because the petition does not show that any ordinance has ever been passed. We think it does. It alleges that the council "duly passed and adopted" the ordinance, a copy of which is set forth in the petition.

Fifth. Because it is made the duty of the common council, by section 8 of article 8 of the charter, to do by resolution what it attempted to do by ordinance. The latter, in our opinion, is the equivalent of the former.

Sixth. Because the property sought to be condemned is not sufficiently described. We think it is.

Judgment reversed, with directions to the court below to overrule the demurrer, with leave to defendants to answer within 10 days after being notified thereof.

We dissent. ROSS, J.; MCKINSTRY, J.

65 Cal. 282

COUNTY OF SAN DIEGO *v.* CALIFORNIA S. P. R. Co. (No. 9,205.)

Filed May 27, 1884.

A district attorney is not authorized to institute a proceeding for the collection of delinquent taxes until after the certification of the delinquent list by the tax collector.

In bank. Appeal from the superior court of San Diego county.

W. J. Hunsaker, Will. M. Smith, and Works & Titus, for appellant.

M. A. Luce and H. E. Cooper, for respondent.

BY THE COURT. The taxes became delinquent upon the twenty-sixth day of December, 1882, and the 5 per cent. to be collected on the amount then became due. The present action was brought by the district attorney on the twenty-ninth of the same month, and before the time fixed by law for the certification of the delinquent list. Before the date last mentioned the defendant paid to the tax collector of the county the full amount of the taxes, together with 5 per cent. thereon. It is not urged that the tax collector had no authority to receive the money, but the district attorney insists that he is entitled to take a judgment in the name of the county for the sum of 10 per centum of the tax. This claim is based upon a provision of a statute (Laws 1869-70, p. 193) which relates to "fees and salary of the district attorney," and reads as follows:

"For services rendered in the *collection* of delinquent taxes, * * * in each case when the tax exceeds fifteen dollars, ten per centum on the sum recovered and collected, *if paid before judgment*; and, if not so paid, then fifteen per centum *to be added to and to constitute part of the judgment*," etc.

Without regard to this, or the question as to whether the district attorney was authorized to institute the action without the direction of the board of supervisors, we think he was not authorized to do so before the certification of the delinquent list.

Judgment affirmed.

THORNTON, J. I concur in the judgment on the grounds stated in the opinion in the department.

2 Cal. Unrep. 322

SOUTHMAYD v. BERRY. (No. 7,267.)

Filed May 27, 1884.

Findings held inconsistent with each other, and with the averments in the complaint, and judgment reversed.

Department 1. Appeal from the superior court of Humboldt county.

W. H. Brumfield, for appellants.

Hanna & Steck, for respondent.

By THE COURT. The findings in this case are indefinite, and are inconsistent with each other, and with the averments of the complaint.

Judgment reversed and cause remanded, with leave to the plaintiff to amend her complaint if she shall be so advised.

McFADDEN v. MASON. (No. 7,410.)

Filed May 27, 1884.

On authority of *Bush v. Lindsey*, 44 Cal. 125; *Allen v. Tiffany*, 53 Cal. 16; and *Chaquette v. Ortet*, 9 Pac. C. L. J. 602, judgment reversed.

Department 1. Appeal from the superior court of Del Norte county.

This was an action against a guardian by a ward for an accounting. The facts are similar to those in *Bush v. Lindsey*, 44 Cal. 125; *Allen v. Tiffany*, 53 Cal. 16; *Chaquette v. Ortet*, 9 Pac. C. L. J. 602.

Edgar Mason, for appellant.

L. T. Cooper, for respondent.

By THE COURT. On the authority of *Bush v. Lindsey*, 44 Cal. 125; *Allen v. Tiffany*, 53 Cal. 16; and *Chaquette v. Ortet*, 9 Pac. C. L. J. 602, the judgment is reversed and cause remanded, with directions to the court below to sustain the demurrers to the complaint.

65 Cal. 269

Ex parte WALTER. (No. 10,957.)

Filed May 26, 1884.

Under section 11, art. 11, of the constitution, providing that "any county, city, town, or township may make or enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws," a board of supervisors has power to regulate the sale of spirituous liquors within the county.

Department 1. Application for discharge on *habeas corpus*.

A. L. Rhodes, E. J. Pringle, and Milton E. Babb, for petitioner.

A. F. Jones, for respondent.

MORRISON, C. J. The defendant was convicted of a misdemeanor, in violating order 8 of the board of supervisors of Butte county, and fined in the sum of \$150. He was charged with carrying on the business of retailing spirituous liquors without having first procured a license for that purpose, as required by order 8 of the board of supervisors of the proper county. It was claimed, on the hearing of the petitioner's application for a discharge on *habeas corpus*, that the order of the board of supervisors imposing the license in question is in violation of certain provisions of the constitution. We do not think so.

By section 11, art. 11, of the constitution, it is expressly provided that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." It is very clear to us that the foregoing provision gives to the board of supervisors the power to regulate the sale of spirituous liquors within the county, and that, therefore, the regulation in question does not violate the constitution.

Writ dismissed and petitioner remanded.

I concur: MYRICK, J.

THORNTON, J. In concurring in the opinion in this case, I wish to add that the authority given by the twelfth section of the same article of the constitution (art. 11) is ample. The full power of taxation for county, city, town, or other municipal purposes, is here given, subject to be controlled, it may be, to some extent by general laws passed by the legislature. The power is not confined to taxes on property, as such. The use of the word "assess" does not so restrict it. *Assess* means to fix directly by statute or ordinance, as well as to fix by valuation. See Webster's and Worcester's Dicts., word, "Assess." The general law and the ordinance are both within the limitations of the organic law, and valid. The eleventh and twelfth sections, taken together, put this conclusion beyond a doubt. See *In re Stuart*, 61 Cal. 375.

We find nothing in article 13 of the constitution in conflict with what is here advanced. In my opinion, sections 11 and 12 of article 11 intended to give full power and authority to the local governments over the subject of licenses, whether for purposes of regulation or revenue, subject to be controlled by general laws. We find no force in the position that, because article 13 refers to taxation on property, with the addition to taxation of incomes, and invests the legislature with power over taxation of such objects or subjects, that, therefore, the local political subdivisions are or can be limited to the same subjects. The maxim, *expressio unius est exclusio alterius*, of very infrequent application, at any rate, and always to be cautiously invoked and applied, has no application here. The general frame of the constitution excludes it, and the rule of construction fixed by the constitution itself, in section 22 of article 1, forbids it.

2 Cal. Unrep. 322

BROWN v. SUPERIOR COURT. (No. 8,011.)

Filed May 27, 1884.

Where a court has jurisdiction of the subject-matter, and of the parties to an action, an order, though erroneous, if not in excess of jurisdiction, cannot be reviewed on *certiorari*.

Department 1. Application for writ of *certiorari*.

Jas. A. Shankland, for petitioner.

By THE COURT. The superior court having jurisdiction of the estate of the insolvent, Baehar, and of all persons interested in it, it is clear that the order of that court directing the assignee to pay out of the estate certain sums of money, if erroneous, was not in excess of its jurisdiction.

Writ denied and proceedings dismissed.

65 Cal. 285

SOTO v. VANNOY. (No. 7,867.)

Filed May 23, 1884.

If, in a contested election case, the proceedings are dismissed for insufficiency or want of prosecution, or if the election of the respondent be confirmed, the judgment must be against the person contesting, for costs; if the election be annulled or set aside, the judgment for costs must be against the respondent.

Findings *held* supported by the evidence.

Department 2. Appeal from the superior court of Monterey county.

R. M. F. Soto, appellant, in *pro. per.*

H. V. Morehouse and *D. S. Gregory*, for respondent.

BY THE COURT. This is a contested election case. The court below found that the vote, as between the contestant and respondent, was a tie vote, and thereupon rendered judgment in favor of respondent, and for his costs. Under sections 1114 and 1122, Code Civil Proc., judgment in a contested election case is authorized to be one of three, viz.: (1) Of dismissal, if the statement of the cause of contest be insufficient; (2) confirming the election; (3) setting aside and annulling the election of the respondent, if the number of his legal votes be reduced *below* the number of votes given to some other person.

According to section 1125, if the proceedings are dismissed for insufficiency or want of prosecution, or if the election of the respondent be confirmed, the judgment must be against the person contesting, for costs; if the election be annulled and set aside, the judgment for costs must be against the respondent. Each party is primarily liable for his own costs to the officers and witnesses entitled thereto, but he cannot recover them of the other party to the proceeding unless he brings himself within the statute authorizing such recovery. In this case the respondent does not so bring himself. The judgment neither confirms nor annuls the election.

It does not appear that any error was committed by the court in arriving at the conclusion that there was a tie vote.

The judgment is reversed.

65 Cal. 287

ESTATE OF MARREY. (No. 8,590.)

Filed May 23, 1884.

An executor cannot in any case litigate the claim of one legatee, (whether that legatee be himself or another person,) as against other legatees, at the expense of the estate.

In bank. Appeal from the superior court of the city and county of San Francisco.

Henry E. Highton, for appellant.

John M. Burnett and *Frank J. French*, for respondent.

McKINSTRY, J. The appeal of the *executor* from the decree of settlement and distribution must be dismissed. He cannot in any case litigate the claim of one legatee as against the others at the expense of the estate. *Bates v. Ryberg*, 40 Cal. 466. *A fortiori*, when he himself is the legatee whose claim he is attempting to maintain, at the expense of the estate, in his capacity of executor.

Appeal dismissed.

We concur: ROSS, J.; SHARPSTEIN, J.; MYRICK, J.; MORRISON, C. J.

I dissent: THORNTON, J.

PEOPLE v. BENNETT. (No. 10,928.)

Filed May 28, 1884.

On authority of *People v. Herbert*, 10 Pac. C. L. J. 292, and *People v. Raten*, 11 Pac. C. L. J. 363, the instructions in this case are approved.

Verdict *held* sustained by the evidence.

In bank. Appeal from the superior court of Solano county.

The decision in this case, in department, will be found *ante*, 868. The instructions given were similar to those in *People v. Herbert*, 10 Pac. C. L. J. 292, and *People v. Raten*, 11 Pac. C. L. J. 363.

Geo. W. Bowie and *L. B. Mizner*, for appellant.

The Attorney General, for respondent.

BY THE COURT. The instructions given in this case are approved in *People v. Herbert*, 10 Pac. C. L. J. 292, and followed in *People v. Raten*, 11 Pac. C. L. J. 363. The rule as to apparent necessity was fully explained in the second and fifth instructions. The verdict is sustained by the evidence.

Judgment and order affirmed.

v.3,no.14—57

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SUPREME COURT OF CALIFORNIA.

(65 Cal. 275)

PEOPLE v. BLAKE. (No. 10,941.)

Filed May 27, 1884.

Drunkenness, voluntarily brought on, is, of itself, no excuse for crime.

Insanity, produced by protracted over-indulgence in intoxicating liquors, may be held to be an excuse for crime.

Drunkenness is admissible in evidence on the question of intent, where the intent is an element in the constitution of the offense, and without which the offense could not be committed; and if the accused was in such a condition of mind from intoxication as to be incapable of forming such intent, he could not have committed the crime or incurred guilt.

Department 2. Appeal from superior court of Stanislaus county.

L. J. Maddox, for appellant.

J. C. Simmons, for respondent.

THORNTON, J. The defendant was accused by information of the forgery of a promissory note. The specific averments were that defendant "did feloniously, willfully, and falsely make, utter, and pass to one John Robinson, a certain false, forged, and counterfeit note as true and genuine," etc. The defendant was tried and convicted.

It is urged that the court on the trial committed errors prejudicial to defendant, to which our attention is called on this appeal.

The first point made is the ruling of the court on an offer made on behalf of defendant. An extract from the bill of exceptions will best show the point made:

"L. B. Watthall duly sworn:

"*Defendant*. I understand from the ruling of the court that I am not allowed to go back of this transaction.

"*Court*. I shall certainly not allow you to prove the general character and general habits prior to this act as to his drunkenness.

v.4,no.1—1

"*Defendant.* So that we may get ourselves on record properly, defendant offers to prove these facts, the court may deny the testimony, and I take my exceptions at this time. If the court is falsified, then it is not necessary to call any more witnesses. The defendant proposes to prove this: That the defendant has for twenty years, or from fifteen to twenty years, been a strong drinker; that he is a man who when drunk acts unconsciously; and that from the excessive use of alcohol he is affected with chronic alcoholism, inebriate; in other words, dipsomania. And we propose to prove by witnesses—

"*Court.* In other words, you offer to prove insanity?

"*Defendant.* That he is insane from confirmed and excessive use of alcohol. We propose to prove that he is affected with dipsomania, and that he is arrived at that stage, whenever he is under the influence of liquor, that he is unable to tell what he is doing,—that he is unable to distinguish right from wrong,—and we will supplement this by proving that at the time he did the act he was under the influence of liquor."

The court refused to allow this testimony, to which defendant reserved an exception.

The offer might have been put with more clearness, but we think that by its fair interpretation it was an offer to show that the defendant was afflicted with dipsomania; that from protracted habits of intemperance his mind had been impaired; that when he was under the influence of liquor he was insane, did not know what he was doing, could not distinguish right from wrong; and that he was in that state when he committed the act of which he was accused. Under these circumstances should not the defendant have been allowed to introduce the testimony offered?

It has been so frequently and so generally held both in England and in the highest court of this and other states of the Union that drunkenness voluntarily brought on is no excuse for crime that it may be considered as settled law. The propriety of such a law is well vindicated by DENIO, J., in *People v. Rogers*, 18 N. Y. 9. "It will, moreover, occur to every mind that such a principle is absolutely necessary to the protection of life. In the forum of conscience there is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect, and the reckless taking of life by one infuriated by intoxication; but human laws are based upon considerations of policy, and look rather to the maintenance of personal security and social order than to an accurate discrimination as to the moral qualities of individual conduct. But there is, in truth, no injustice in holding a person responsible for his acts committed in a state of voluntary intoxication. It is a duty which every one owes to his fellow-men and to society, to say nothing of more solemn obligations, to preserve, so far as lies in his power, the inestimable gift of reason. If it is perverted or destroyed by fixed disease, though brought on by his own vices, the law holds him not accountable. But if, by a voluntary act, he temporarily casts off the restraints of reason and conscience, no wrong is done him if he is considered answerable for any injury which, in that state, he may do to others or to society." *Kenney v. People*, 31 N. Y. 330; *Jones v.*

Com. 75 Pa. St. 403; *Swan v. State*, 4 Humph. 136; *Pirtle v. State*, 9 Humph. 663; *State v. Tatro*, 50 Vt. 483; *Hopt v. People*, 104 U. S. 631; *Boswell's Case*, 20 Grat. 860; *People v. Nichol*, 34 Cal. 215-217; *People v. Lewis*, 36 Cal. 531.

But it has been held in this state and in other states, where the crime of murder is divided by statute into two degrees, the higher degree requiring deliberation and premeditation, that evidence of intoxication is admissible upon the question as to the issue whether the homicide was committed with the above-named requisites. *People v. Belencia*, 21 Cal. 544; *Same v. King*, 27 Cal. 507; *Same v. Nichol*, 34 Cal. 212; *Same v. Lewis*, 36 Cal. 531; *Same v. Williams*, 43 Cal. 344.

There are also numerous cases in which it has been ruled that drunkenness is admissible on the question of intent. As where the intent is an element in the constitution of the offense, and without the intent the offense could not be committed. If an accused person was in such a condition of mind from intoxication as to be incapable of forming such intent, he could not have committed the crime, or incurred guilt. Being incapable of forming the criminal intent, he should be acquitted. *State v. Bell*, 29 Iowa, 316; *Scott v. State*, 12 Tex. App. 31; *Wenz v. State*, 1 Tex. App. 36; *Roberts v. People*, 19 Mich. 401; concurring opinion of COOLEY, J., in *People v. Cummins*, 47 Mich. 334; S. C. 11 N. W. Rep. 184, 186; *People v. Harris*, 29 Cal. 678; *Pigman v. State*, 14 Ohio, 555; *Wood v. State*, 34 Ark. 341. The case last cited was an indictment for grand larceny in taking a pistol. The trial court was asked to instruct the jury that if they believed, from the evidence, the defendant took the pistol, but that at the time he was so under the influence of intoxicating liquor that a felonious intent could not have been formed in his mind, they should find him not guilty. This instruction was refused. On appeal this ruling was held error.

The above rulings in relation to drunkenness are in accord with the statute law of this state, as expressed in section 22 of the Penal Code. Insanity produced by protracted over-indulgence in intoxicating liquors may be held to be an excuse for crime, and if such is the offer of the defendant, the court below erred in its ruling.

But, taking the offer to be what is clearly implied by its terms, that in consequence of protracted intemperance the mental faculties had been impaired to such an extent that intoxication deprived the defendant of the capacity to distinguish between right and wrong, and that he did not know what he was doing, we think, on the authority of the cases above cited, that the evidence was clearly admissible on the question of intent. That intent is an element in the offense for which the defendant was tried cannot, we think, be gainsaid. The statute makes an intent to defraud an element in such offense. See Penal Code, § 470. By the provisions of the section cited, "every person who, with intent to defraud another, falsely makes * * *

any * * * promissory note," "or utters, publishes, passes, or attempts to pass, any false or forged promissory note, * * * with intent to defraud any person," is guilty of the crime of forgery. Now, the criminality of the defendant under this statute depends upon his mental condition at the time he committed the offense charged. If he was unable or incapable of forming such intent, he cannot be held guilty. The offer made was to prove that the defendant was in such a condition that he did not know what he was doing at the time he committed the offense with which he was charged. We think the court should have allowed the defendant to try to make good his offer by evidence, and rejecting it was error.

The ability of the defendant to establish what he offered to prove may seem to be highly improbable, but we cannot admit that for this reason his offer should have been rejected. We cannot say that it is impossible for the defendant to sustain his offer by proof. Unless it is clearly impossible to make such proof, it cannot, as a matter of law, be affirmed that the defendant should be debarred from making the trial.

We find no other error in the record; but for the error above pointed out the judgment is reversed, and the cause remanded for a new trial.

We concur: MYRICK, J.; SHARPSTEIN, J.

65 Cal. 288

PEOPLE *v.* FERGUSON. (No. 9,202.)

SAME *v.* PONET. (No. 9,202½.)

Filed May 28, 1884.

Under the authority granted by the legislature to boards of supervisors of the several counties to license all classes of business, shows, etc., the general power given to collect the same includes the power to appoint an agent to make such collections.

In bank. Appeal from the superior court of Los Angeles county.
J. D. Godfrey, for appellants.

Stephen M. White, for respondent.

BY THE COURT. Section 12 of article 11 of the Constitution provides: "The legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." By an act entitled "An act to establish a uniform system of county and township governments," approved March 14,

1883, (St. 1883, p. 299,) the legislature empowered the board of supervisors of the several counties "to license, for purposes of regulation and revenue, all and every kind of business not prohibited by law, and transacted and carried on in such county, and all shows, exhibitions, and lawful games carried on therein; to fix the rates of license tax upon the same; and to provide for the collection of the same by suit or otherwise." The general power thus conferred on the board to collect, includes the power to appoint an agent to do so. This view does not, we think, at all conflict with section 5 of article 11 of the constitution.

Judgments affirmed.

McKINSTRY, J. I dissent.

McKEE, J. I dissent. This an action to compel payment of a license tax for carrying on, within the county of Los Angeles, the business of keeping a livery-stable. The tax was imposed by an ordinance passed by the board of supervisors of the county of Los Angeles, under the provisions of an act of the legislature entitled "An act to establish a uniform system of county and township governments," approved March 14, 1883, (St. 1883, p. 299.) After fixing the license tax, the ordinance provided how licenses therefor were to be issued, and from whom obtained, by the following provisions, viz.:

"Sec. 39. The county auditor must prepare and have printed blank licenses in accordance with the provisions of this ordinance, with a blank receipt attached, for the signature of the license tax collector when sold.

"Sec. 40. The county auditor must affix his official seal to, number, and sign all licenses, and from time to time deliver them to the license tax collector in such quantity as may be required, taking his receipt therefor, and charge him therewith, giving in the entry the number, classes, and amount thereof."

From the "license tax collector" the tax-payers were to procure licenses. There was, however, no such office or officer in Los Angeles county then known to the law. But the ordinance provided as follows:

"Sec. 47. In order to facilitate the collection of said license tax and to better enforce payment thereof, the board of supervisors of the said county shall, upon the adoption of this ordinance, appoint a suitable person license tax collector of the said county, to hold office during the pleasure of said board, and such license tax collector shall perform the duties herein imposed upon the license tax collector, and shall collect, as far as practicable, all license tax moneys which may become due under the provisions of this ordinance, and shall personally demand payment thereof from all persons owing such license tax who may neglect to make prompt payment of the same, and, as full compensation for all services performed by said license tax collector, he shall receive ten (10) per cent. of all moneys collected and duly accounted for by him under this ordinance."

After the enactment of the ordinance, and pursuant to its provisions, the board of supervisors did appoint one A. W. Ryan, a suitable

person, "license tax collector," who qualified, and has acted as such officer in said county.

A license tax collector for a county is a county officer; the person acting as such is therefore a county officer of Los Angeles county; and the question with which we are confronted at the threshold of the case is, whether the board of supervisors had power by ordinance to create such an office, and to fill it by their own appointment.

The power is claimed under the provisions of the county government act. By that statute the legislature, in exercising the power conferred upon it by section 12, art. 11, of the constitution of the state, to vest in the corporate authorities of the several counties of the state power to assess and collect taxes, for county purposes, upon the inhabitants or property of the counties, did vest the boards of supervisors of counties with power "to license, for purposes of regulation and revenue, every kind of business not prohibited by law; and to provide for the collection of the same by suit or otherwise." Section 27.

It may be conceded that the power to provide for the collection of taxes for county purposes would include the power to provide for creating an office, and for the election or appointment of an officer to enforce collection of such taxes, if there was nothing in the constitution of the state to prevent the inclusion of such a power in the general power. But section 5, art. 11, of the constitution provides that "the legislature, by general and uniform laws, shall provide for the election or appointment in the several counties of boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township, and municipal officers as public convenience may require; and shall prescribe their duties and fix their terms of office. It shall regulate the compensation of all such officers in proportion to duties, and for this purpose may classify the counties by population." And by section 25, art. 4, the legislature is prohibited from "passing any local or special laws creating offices, or prescribing the powers or duties of officers in counties, or affecting the fees or salary of any officer." From these provisions of the constitution it follows that the legislature alone has the power to provide for the election or appointment of county or township officers, to prescribe their duties, fix their terms of office, and regulate their compensation; and this power must be exercised by general and uniform laws.

The legislature has not by any general and uniform law provided for the election or appointment of a "license tax collector" in the several counties of the state, unless it has done so by the provisions of the county government act. But there is nothing in the provisions of that act which authorizes the boards of supervisors of the several counties of the state to provide for the creation of county offices or for the election or appointment of county officers. On the contrary, it declares what county officers are provided for each county in the state, how and when they are to be elected and take office, what duties

they shall perform, and what salaries they shall receive, (sections 57, 60, 70, 162, *et seq.*) and the office of license tax collector is not one of them.

As, therefore, the act contains no direct provisions authorizing boards of supervisors to create a county office, or to provide for the election or appointment of a county officer to fill the office, or to fix the term of office, prescribe the duties of the officer, and declare his compensation; and as the constitution prohibits that from being done by any other body than the legislature, acting under constitutional forms,—it follows that the power to create, elect, or appoint to such an office cannot be inferred as incidental to a general power for the assessment and collection of taxes; therefore the provisions of the ordinance under consideration are as to that subject void; and, as there was no office and no officer from whom licenses were obtainable and to whom license taxes could be paid, the defendant is not liable for transacting business without having obtained a license.

I think that judgment should be reversed and cause remanded.

65 Cal. 295

PEOPLE v. BROOKS. (No. 10,906.)

Filed May 29, 1884.

On an information for assault with intent to commit robbery, together with a charge of prior conviction of grand larceny, an arraignment of defendant, in the mode required by section 988 of the Penal Code, is allowable and proper.

Where an information charges a felony, together with a prior conviction, and the accused pleads not guilty of the offense charged, but confesses the prior conviction, a general verdict that the defendant is found guilty as charged in the information is broad enough to cover all the issues in the pleading, and is in all respects regular, and it is not necessary that the jury should find specially as to the prior conviction.

Where a term of punishment is not definitely fixed, but the statute provides that it shall not be less than 10 years, the court has power to sentence defendant for the term of his natural life or for any number of years, not less than 10.

Department 2. Appeal from the superior court of Marin county.
F. M. Angellotti, for appellant.

The Attorney General, for respondent.

THORNTON, J. The defendant was accused by information of an assault with intent to commit robbery, and was further charged in the same information of having been, before the commission of the offense above mentioned, convicted of the crime of grand larceny.

The defendant was arraigned in the mode required by section 988 of the Penal Code. This was allowable. This court so held in *People v. Lewis*, 1 PAC. REP. 490. The 1025th section of the Penal Code which prescribed the mode of arraignment where a previous conviction was charged, having been repealed before the arraignment of the defendant was had, such arraignment of defendant could only

be made under section 988 of the Penal Code, which applied to all cases where arraignment was requisite. *People v. Lewis, supra*. This mode of arraignment was entirely different from that pursued in *People v. King*, 12 Pac. C. L. J. 322. In that case the defendant was asked on his arraignment whether he had suffered a previous conviction. He was then arraigned under the 1025th section of the Penal Code, which had at that time been repealed. The court held this was error and for that reason reversed the judgment. In *People v. Lewis* the defendant was arraigned under section 988, and this court held the arraignment proper. No question was put to the defendant in *People v. Lewis* as in *People v. King*, whether or not he had suffered a previous conviction, and this court found nothing illegal in the arraignment in *Lewis' Case*. Lewis pleaded not guilty, and it was held that he was properly triable on such a plea.

The special mode of arraignment in section 1025 having been done away with by a repeal, did not leave the courts without a mode of arraignment. The section (988) afforded a mode of arraignment applicable to this as well as other informations or indictments for criminal offenses. The trial courts could do nothing else than resort to the mode pointed out by section 988.

On the arraignment of the defendant in the case under consideration, he, as it appears from the transcript, in reply to the usual question whether he pleaded "guilty or not guilty," pleaded as follows: "That he is not guilty of the offense charged, and confesses and admits that he was, before the alleged commission of said offense, convicted of the crime of grand larceny as set forth in the information."

The confession as to the prior conviction was voluntarily tendered by the defendant, in response to the usual inquiry whether he pleaded guilty or not guilty. No question was put to him by the court or at its instance as to the former conviction. His guilt in that regard was by him voluntarily confessed.

The jury found a general verdict that the defendant was guilty as charged in the information. This verdict was broad enough to cover all the issues made by the pleading, and was in all respects regular. It was not necessary after the voluntary confession of the defendant that the jury should find specially as to the previous conviction. Penal Code, § 1158. The court might well render judgment on the verdict and the voluntary confession of the defendant. Section 1150, *supra*.

The confession made in this case on the arraignment as to the previous conviction is the *answer* of section 1158, or that word means nothing. That he is allowed to answer in this way is evident from the first subdivision, section 1093, Penal Code. The section, down to and including subdivision 1, is as follows:

"The jury having been impaneled and sworn, the trial must proceed in the following order, unless otherwise directed by the court: (1) If the indict-

ment or information be for felony, the clerk must read it and state the plea of the defendant to the jury; and in cases where it charges a previous conviction and the defendant has confessed the same, the clerk in reading it shall omit therefrom all that relates to such previous conviction. In all other cases this formality may be dispensed with."

Although the question could not, since the repeal of section 1025, be asked of defendant whether he had suffered a previous conviction, still it is evident from sections 1093 and 1158 that he might answer voluntarily that part of the indictment when read to him on his arraignment; and when he confessed such conviction in his answer, the clerk was required to omit what related to it. This course was pursued on the trial of this defendant, and we see no error in it. The defendant was not bound to answer the question if put, nor was the court allowed to ask it after the repeal of section 1025, but there was nothing inhibiting the defendant from a voluntary answer; and when he did so answer, admitting or denying the previous conviction, the court, under section 1158, in the latter case, when the conviction is denied, must take the verdict of the jury on the issue of previous conviction, and the jury must respond as required by section 1158. If confessed, there need be no verdict on the answer under the same section, and the court can proceed on the verdict as to the other issues in the case, and pronounce judgment on the verdict when it declares guilt, and the voluntary answer or confession. Section 1207, Penal Code, directs the mode in which judgment is entered. There is nothing here in conflict with *People v. King, supra*; and all said here is in harmony with *People v. Lewis*.

In the last case the judge refused to receive the confession, which was tendered after arraignment, and while the trial was going on directed the jury to find under the plea of not guilty on the issue of prior conviction, whether true or not, in accordance with section 1158, and this court approved the course pursued by the lower court. As to this matter, we think it proper to remark that the legislation in regard to it is most singular. Why sections 969 and 1025 should be repealed, leaving section 1158 unrepealed, we cannot conceive. It has produced great embarrassment in the administration of criminal justice, and has been of benefit to no one. It would have been better to have left these three sections standing unrepealed or repeal them all. Great caution must be observed in amending the four Codes. They are to be construed as parts of the same statute, (Pol. Code, § 4480;) and in pursuing the mode usually adopted of amending, by amending one section, unless all the provisions of the Code, and especially of the Code to be amended, are kept in mind and considered, incongruities, contradictions, and anomalies will get into the Codes and each of them, which will produce much delay and embarrassment of justice, and results brought about much to be deprecated, and by all means to be avoided. See Pol. Code, §§ 4478 to 4484, both inclusive.

The defendant was adjudged to suffer the punishment of imprisonment in the state prison for 35 years. It is said that this punishment is greater than that allowed by law. We cannot admit the soundness of this contention. The defendant had previously suffered a conviction of grand larceny, which was punishable with confinement in the state prison for not less than one nor more than ten years. Penal Code, § 489. He was also convicted of an assault with intent to commit robbery, punishable by imprisonment in state prison for more than five years. *Id.* § 220. This brings the case within section 666 of the same Code and the first subdivision thereof. This section, including the subdivision referred to, is as follows:

"Every person who, having been convicted of any offense punishable by imprisonment in the state prison, commits any crime after such conviction, is punishable therefor as follows: If the offense of which such person is subsequently convicted is such that upon a first conviction an offender would be punishable by imprisonment in the state prison for any term exceeding five years, such person is punishable by imprisonment in the state prison not less than ten years."

The previous conviction of grand larceny rendered defendant punishable by imprisonment in the state prison. Section 489, *supra*. The subsequent conviction of defendant rendered him punishable by imprisonment in the state prison for a term exceeding five years. Section 220, *supra*. Then the defendant by section 666, subd. 1, (1) is punishable by like imprisonment *for not less than 10 years*. The term of punishment is not definitely fixed, and under section 671 of the same Code, the court has the power to sentence defendant for the term of his natural life or for 10 years, or any number of years not less than 10. The court, by its judgment, selected as the period of imprisonment the term of 35 years. This sentence is then in accordance with the sections just above referred to, and is valid.

We find no error in the record, and the judgment is affirmed.

We concur: SHARPSTEIN, J.; MYRICK, J.

65 Cal. 300

PEOPLE v. BROOKS. (No. 10,921.)

Filed May 29, 1884.

On a conviction of burglary in the second degree, and voluntary confession of prior conviction of grand larceny, defendant may be punished by imprisonment for 10 years, or for any other term less than 10 years.

On the authority of *People v. Brooks*, ante, 7, judgment affirmed.

Department 2. Appeal from the superior court of Marin county.
F. M. Angellotti, for appellant.

The Attorney General, for respondent.

THORNTON J. In this case, all the points made on behalf of appellant, except as to the punishment, are the same as in *People v. Brooks*, ante, 7, and the ruling in that case must govern this. The points alluded to are not sustainable.

The defendant was charged by information with the crime of burglary and with having suffered a previous conviction of grand larceny. He was convicted of burglary in the second degree, and voluntarily confessed the other. He was sentenced to suffer imprisonment in the state prison for 10 years. Under the previous conviction of grand larceny he was liable to imprisonment in the state prison, (Penal Code, 489,) and on conviction for burglary he was liable to imprisonment in the same prison for not more than five years. Under section 666, Penal Code, and second subdivision thereof, he was then punishable with imprisonment for 10 years or any term less than 10 years. He was sentenced for 10 years. The contention is without any foundation to support it.

The counsel for defendant is mistaken in stating that defendant was asked any other question on his arraignment than whether he was guilty or not guilty. The record shows that this question alone was asked.

There is no error disclosed in this cause, and the judgment is affirmed.

We concur: MYRICK, J.; SHARPSTEIN, J.

65 Cal. 293

CALIFORNIA S. R. Co. v. SOUTHERN P. R. Co. (No. 9,369.)

Filed May 29, 1884.

Where, in an action for condemnation of land, plaintiff obtains judgment of condemnation, and judgment is also given defendant for the value of certain fences and cattle-guards, and plaintiff fails to give the bond authorized by the statute and judgment, for the erection of such fences and cattle-guards, within the required time, the defendant is entitled to an execution to enforce the payment of the amount adjudged.

Department 1. Appeal from the superior court of San Diego county.

A. B. Hotchkiss, for appellant.

M. A. Luce, for respondent.

Ross, J. In an action by the plaintiff against the defendant for the condemnation of a right of way over certain lands of the defendant, the court below, after trial had, gave plaintiff judgment of condemnation upon the payment to defendant of the value of the land taken, and defendant judgment against the plaintiff in the amount assessed for the cost of fences and cattle-guards along the line of the plaintiff's road, with a provision in the judgment that unless plaintiff should, within 30 days, elect to build the fences and cattle-guards, and execute to the defendant a bond, with sureties, to be approved by the court, in double the assessed cost of the same, to build such fences and cattle-guards, then defendant should have execution for the amount adjudged it, to-wit, for the sum of \$11,954. In so providing the court below proceeded under section 1251 of the Code of Civil Procedure, which reads:

"The plaintiff must, within thirty days after final judgment, pay the sum of money assessed, but may, at the time of or before payment, elect to build the fences and cattle-guards, and if he so elect, shall execute to the defendant a bond, with sureties to be approved by the court, in double the assessed cost of the same, to build such fences and cattle-guards within eighteen months from the time the railroad is built on the land taken, and if such bond be given, need not pay the cost of such fences and cattle-guards. * * *"

It is contended by appellant's counsel that this provision of the Code of Civil Procedure has been abrogated by section 14 of article 1 of the present constitution. But in this case it is not necessary to decide that point, for the reason that the bond executed by the plaintiff within the time mentioned in the statute as well as in the judgment was insufficient. Without reference to any other objection made to that bond, it was insufficient in that there was, in the aggregate, but one surety, in double the assessed cost of the fences and cattle-guards. The bond authorized by the statute and judgment not having been given within the time required, the defendant was entitled to an execution to enforce the payment of the amount adjudged it. What is called in the record the "amended bond" was unauthorized either by the judgment or statute.

Order reversed.

We concur: MCKINSTRY, J.; MCKEE, J.

65 Cal. 295

CALIFORNIA S. R. Co. v. SOUTHERN P. R. Co. (No. 9,370.)

Filed May 29, 1884.

An order denying a motion to set aside the final order of condemnation made in certain condemnation proceedings is not an appealable order.

Department 1. Appeal from superior court of San Diego county.
A. B. Hotchkiss, for appellant.

M. A. Luce, for respondent.

BY THE COURT. This is an appeal from an order denying a motion made by the defendant to set aside the final order of condemnation made in certain condemnation proceedings. The order denying the motion is not appealable. "It was," as said in *Henley v. Hastings*, 3 Cal. 342, "the mere negative action of the court declining to disturb its first decision. It is that decision which is the proper subject of complaint, and the refusal to alter it, any number of times, would not make it less so."

The appeal is dismissed.

2 Cal. Unrep. 323

ALEMANY, Archbishop, v. ORTEGA. (No. 9,494.)

Filed May 29, 1884.

Findings *held* sustained by the evidence.

Department 1. Appeal from the superior court of Santa Barbara county.

J. F. Richards, for appellant.

R. B. Canfield, for respondent.

BY THE COURT. This is an action for an alleged forcible entry upon lands alleged to have then been in the actual occupancy of the plaintiff. We think the evidence fails to show that there was any forcible entry on the part of the defendant, or that the land in question was in the possession of the plaintiff. But that, on the contrary, it shows that the land was in the possession of Francisco Mora, bishop of Monterey, and lessor of the defendant at the time of the latter's entry.

Judgment and order affirmed.

65 Cal. 292

BUELL v. SAN FRANCISCO SAVINGS UNION. (No. 9,458.)

Filed May 29, 1884

Where a party has an adequate remedy at law, in an action then pending against him for the foreclosure of a mortgage, an injunction will not be granted to restrain the sale of the property.

Department 1. Appeal from the superior court of Santa Barbara county.

Plaintiff was the owner of a ranch which he mortgaged to defendant. Defendant after some time foreclosed the mortgage, whereupon plaintiff and defendant entered into an agreement whereby, in consideration of certain stipulations, plaintiff agreed to stay proceedings on execution. Plaintiff claimed that the stipulations were not fulfilled, and proceeded under the execution. Defendant obtained a temporary injunction in a separate proceeding, and a different court, to restrain the sale under execution, which injunction was afterwards, on motion of plaintiff, dissolved. Defendant appealed.

W. C. Stratton, for appellant.

Charles Ferndale and *Henry C. Campbell*, for respondent.

BY THE COURT. Appeal from an order dissolving an injunction. There was not only no abuse of discretion on the part of the court below in making the order, but the court was clearly right in doing so. If the present defendant, in enforcing the decree of foreclosure, entered in the action brought by it against Buell, violated the stipulation of November 18, 1882, Buell's remedy was in that action, the court having power to control the writ. Besides, it was shown to the court below that the present plaintiff did not comply with the conditions of the stipulation, which, according to its provisions, alone entitled him to the stay of the execution of the decree claimed by him.

Order affirmed.

(65 Cal. 304)

HEINLEN v. SOUTHERN P. R. Co. (No. 9,507.)

Filed May 31, 1884.

A motion to dismiss, on the ground that no transcript was filed, being made, and time granted to file affidavits showing why the transcript has not been filed, and no affidavits being filed, the appeal will be dismissed, though a transcript be filed in the mean time.

Department 2. Appeal from the superior court of Tulare county.
Bennett & Wigginton, for appellant.

G. A. Heinlen and Atwell & Bradley, for respondent.

BY THE COURT. The notice of appeal was given September 9, 1882. On the first of April, 1884, the plaintiff (respondent) moved that the appeal be dismissed, on the ground that no transcript had been filed in this court. Time was given to appellant to file affidavits showing why the transcript had not been filed. The time given having expired, and no affidavits having been filed, it is ordered that the appeal be dismissed. A transcript was filed after the motion was made, but no reason appears why it was not filed before.

Appeal dismissed.

(2 Cal. Unrep. 323)

TALMADGE v. STRETCH. (No. 8,699.)

Filed May 29, 1884.

Where a receipt and a note are executed contemporaneously, the receipt is admissible in an action on the note, where there is evidence to show that both were part of one transaction; and oral testimony is admissible to apply the receipt to the note and to prove that it was the only consideration for the note.

Money advanced by the plaintiff to the defendant on account of the latter's share of the capital in a business, which sum he was to invest and contribute to the business, is sufficient consideration to support a note given to secure such sum, and plaintiff may recover on such note, though the plaintiff and defendant were partners at the time of giving such note.

Department 1. Appeal from the superior court of San Joaquin county.

J. B. Hall, for appellant.

Byers & Elliot, for respondent.

BY THE COURT. 1. There was a substantial conflict in the evidence with reference to the truth or falsehood of the matter set up in defendant's answer.

2. The receipt was admissible as there was evidence tending to prove that it was executed and delivered contemporaneously with the note; that both papers were parts of one contract or transaction.

3. The oral testimony was admissible to apply the receipt to the

note, to prove that it was given in return and as the only consideration for the note.

4. The plaintiff requested the court to instruct the jury:

"If the jury find from the evidence that the note was given to secure to the plaintiff money which plaintiff had advanced for defendant, on account of the defendant's share of the capital, which he was to contribute and invest in the business, then the note is supported by a sufficient consideration, and the plaintiff is entitled to recover, although the plaintiff and the defendant were partners at the time of the giving of the note.

Appellant assigns as error the refusal of the court below to give the foregoing instruction.

It is said by respondent there was no evidence upon which to base the instruction. But the plaintiff testified:

"I kept a memorandum of all my expenses, whether of labor done, materials furnished, or money advanced by myself. * * * Well, Mr. Stretch and me looked over the account, from time to time, that was with us, counted everything, and I asked him for his part or his note. He had disappointed me in furnishing his portion. The note was given on the settlement of the first kiln of bricks in which we was partners. We first talked of \$350, but I had the hauling, and I told him I had to pay out considerable, and finally I said I thought \$375 would be about right, and he agreed to give it to me, and he said he thought he would be able to pay it in a short time; and finally he came out in the field one day where I was heading, and said he would like to turn so much where he was owing, and asked me to give an order, and he gave me a note, and I gave him what I supposed to be an order; he called it an order, and I supposed it was. I did not read either paper; he read them both over."

The testimony of plaintiff, if credible, tended to prove that the promissory note was given in consideration of money advanced by plaintiff for defendant towards the latter's share of the capital by him to be contributed. The instruction should therefore have been given.

Judgment and order reversed, and cause remanded for a new trial.

65 Cal. 301

MCBRIDE v. FALLON. (No. 7,678.)

Filed May 30, 1884.

Where there are two judgments in cross-actions, one might be set off against the other, and one, if smaller, would be satisfied in full, and the other to the extent of the smaller, and an execution might issue for the balance; neither party by assigning his judgment can defeat the right of the other to have his judgment so set off. A judgment cannot in any case be levied on and sold under execution.

Department 2. Appeal from the superior court of Santa Clara county.

S. O. Houghton and John Reynolds, for appellant.

L. Archer, for respondent.

SHARPSTEIN, J. On the eighth day of February, 1878, the plaintiff recovered a judgment against the defendant, in the district court of the Twentieth judicial district, for the sum of \$900 damages and \$284.40 costs. Afterwards, on the nineteenth day of April, 1878, in the same court, the defendant recovered a judgment against the plaintiff for the sum of \$345.85. On the sixth day of June, 1878, an execution was issued on the last-named, and levied on the first-named, judgment, which was sold under said execution for \$10. The plaintiff, in whose favor the judgment so levied upon and sold was entered, moved the court, after said sale, that execution issue thereon. The motion was granted, and from that order this appeal was taken.

The judgments were in cross-actions; and one might have been set off against the other: the smaller thereby satisfied in full; the larger, to the extent of the smaller; and an execution have issued for the balance. Neither of the parties by assigning his judgment to a third party could have defeated the right of the other to have his judgment so set off. The assignee in that case would "take the demand and *cum onere* with the right of set-off still clinging to it." *Peirce v. Bent*, 69 Me. 381. And if we were to concede, which we do not, that in other cases a judgment could be levied upon and sold under execution, in the manner in which the plaintiff's judgment was, we should hesitate before holding that in a case of judgment in cross-actions, the larger might be levied on and sold under an execution issued on the smaller, for a mere fraction less than one-thirtieth of the amount due upon it, and thereby deprive the person having the larger of his entire judgment, and leave the smaller judgment to stand against him, mostly unsatisfied. We think the right to have one judgment set off against another could not in that way be defeated. The smaller judgment was liable at any time to be swallowed up by the larger one. The holder of the latter could not prevent the holder of the former from having it set off, *pro tanto*, against the larger judgment, and the holder of the smaller judgment could not prevent the holder of the larger from having the smaller so set

off, and then having execution issue for the balance due on the larger. The rights of the parties in that respect were reciprocal. We are clearly of the opinion, however, that a judgment cannot, in any case, be levied on and sold under execution as the judgment in this case was.

After enumerating the kinds of property of a judgment debtor liable to execution, the Code provides that "shares and interests in any corporation or company, and *debts and credits*, * * * and all other property not capable of manual delivery, may be attached on execution in like manner as upon writs of attachment." Code Civil Proc. 688. "Debts and credits, and property not capable of manual delivery, must be attached" in the mode pointed out in subdivision 5, § 542, Code Civil Proc. That is, "by leaving with the person owing such debts, or having in his possession, or under his control, such credits and other personal property, or with his agent, a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ."

The fact that a debt is evidenced by a judgment does not, in our opinion, make it anything more or less than a debt, or more capable of manual delivery than it would be if not so evidenced. No provision is made for attaching or levying on *evidences* of debt. It is the debt itself which may be attached by writ of attachment, or "on execution in like manner as upon writs of attachment." This we think to be the meaning of the Code; and the mode prescribed by it is exclusive. Code Civil Proc. §§ 4, 18. These views are not opposed to any heretofore expressed by this court in any case to which our attention has been directed. In *Adams v. Hackett*, 7 Cal. 187, a referee, in proceedings supplementary to execution, made an order that the judgment debtor should assign a judgment which he held against a third party. The superior court vacated the order, and, on appeal, this court reversed the order of the superior court. It is unnecessary to point out the distinction between that case and this.

In *Crandall v. Blen*, 13 Cal. 15, *Adams v. Hackett*, although not overruled, appears to be doubted.

In *Davis v. Mitchell*, 34 Cal. 81, it was held that a sheriff might, under an execution and sale, levy on a promissory note belonging to the judgment debtor; and that the purchaser took it subject to any defense which the maker might have had against it, if the payee had retained it. In that case the sheriff had possession of the note and delivered it to the purchaser. The court alluded to that circumstance without passing upon its materiality. The case arose and was decided before the enactment of the Code, which, while it does not prescribe a mode of proceeding in such cases materially different from that pointed out by the late practice act, makes that mode exclusive.

But, independently of that circumstance, we could not, with our present views, assent to the doctrine of that case.

Order affirmed.

We concur: MYRICK, J.; THORNTON, J.

65 Cal. 305

PEOPLE v. WONG AH BANK and another. (No. 10,832.)

Filed May 31, 1884.

It is the duty of an interpreter to interpret and report to the court every statement made by a witness, and the court should so instruct him. It is error to instruct him not to interpret the statement of a witness which the latter states are hearsay, and such instruction if acted on is ground for a reversal.

In bank. Appeal from the superior court of the city and county of San Francisco.

Henry E. Highton, for appellant.

Attorney General Marshall, for respondent.

THORNTON, J. There is no error in this record. The main point, as to the *alibi*, set up by defendants presents a case of conflicting evidence, with no features which take it out of the general rule so frequently announced by this court, that, under such circumstances, there can be no reversal.

There is but one other point which we think it necessary to notice. During the trial a Chinaman was under examination as a witness, through an interpreter, and (we quote from the transcript) the following occurred:

"*Question*. 'When did he [referring to one of the defendants] get up out of his bed of sickness?' *Answer*. 'He was sick that night and the next morning at 9 o'clock. When we got up for breakfast he was sick, and somebody came in, and somebody said there has been some stabbing.'

"*Mr. Murphy*, [interrupting.] 'I submit, your honor, they are not entitled to answer. That is not responsive to my question. I asked him simply when did Wong Ah Bank get up from that bed of sickness?'

"The court then instructed the interpreter, who was interpreting the evidence of the witness, in the language following: 'I will say this, however, to the interpreter, that whenever the witness goes on to state something that has been told to him by somebody else, that he will so inform the court, and then I will not admit that part of the answer. It is not necessary first to receive it before striking it out,—you can avoid it by the interpreter so stating. But so far as this answer is concerned, it is now before the court and jury, and the only thing is to strike out that part which is not responsive.'

"*Mr. Highton*. 'Now, the point I make is, the interpreter is to translate from the English into Chinese, and from the Chinese into English. I claim that he cannot even judge that the Chinaman is stating something that is irrelevant.'

"*The Court*. 'I differ from you; whenever he undertakes to tell something that has been told to him by somebody else, then that he shall so inform the court.'

"*Mr. Highton*. 'I only wanted that to go upon the records. I will except to it. I will note an exception to your instructions to the interpreter.'"

If it appeared in the transcript that these instructions to the interpreter were acted on, and that the interpreter merely reported to the court that the witness had stated something that had been told him by somebody else, and the court had acted on that bare statement, without requiring the interpreter to repeat what the witness had said, we should hold it to be clearly error, for which a reversal should be ordered. It is the duty of the interpreter to interpret and report to the court every statement made by the witness. The court should so instruct the interpreter, and require a strict compliance with such instruction. The direction above given to the interpreter by the court would devolve on the interpreter the duty belonging by law to the court, which duty the court cannot transfer to another person. The parties have a right to hear what was said by the witness, and the court may be asked to rule on it. An interpreter is not selected for the discharge of a duty *essentially judicial*. We think it necessary to make these observations on this point, adding, as above stated, that as it does not appear from the record that the direction to the interpreter was acted on, we find nothing on which to base a judgment for reversal. The error committed was one where no injury to the defendants supervened.

Judgment and order affirmed.

We concur: MORRISON, C. J.; MYRICK, J.; ROSS, J.

65 Cal. 307

PEOPLE *v.* ZIMMERMAN. (Nos. 10,938, 10,959.)

Filed May 31, 1884.

The evidence of an accomplice, corroborated by evidence of an admission made by the defendant connecting him with the killing, is sufficient to sustain a conviction of murder; and the testimony of a constable, to whom the witness, who testified to the admission, had repeated the conversation, is admissible to fix the date of such admission.

In bar'k. Appeal from the superior court of Amador county.

A. C. Brown, for appellant.

Attorney General Marshall, for respondent.

MYRICK, J. These numbers constitute but one appeal, and are but one transcript, No. 10,938 being the statement on motion for new trial, and No. 10,959 the judgment roll.

The defendant was accused of the crime of murder. The principal witness was one Neff, who testified to his being an eye-witness of an assault by defendant upon deceased. The defense objected to the admission of the evidence of Neff, on the ground that the latter

was an accomplice, and that he was not corroborated. Penal Code, 1111. It does not appear that Neff was at all concerned in the commission of the crime for which the defendant was on trial, nor that he had counseled, advised, aided, or encouraged its commission; nor that it was committed in carrying into effect an unlawful design formed by them. Even if Neff had been an accomplice, he was corroborated by the witness Mareno, who testified to an admission made by defendant connecting himself with the killing of deceased. Mareno testified to a quarrel between himself and defendant, in which he said: "Defendant got mad at me and said he would cut me up just the same as he cut that man in Fiddletown. I don't remember exactly when this was." Mareno swore that he went and told a constable what defendant had said. The constable was called and asked as to the date of the complaint made by Mareno, not for the purpose of having the conversation repeated, but for the purpose of fixing the date with reference to the killing of deceased. The constable swore that Mareno made a complaint to him about defendant some 14 months before the time of trial, October 15, 1883. We see no error in the admission of this evidence for the purpose of fixing the date. The homicide was January 25, 1881; and the complaint was made about 14 months before October 15, 1883, or about August 15, 1882, having a tendency to show that defendant, in his threat to Mareno, had reference to the killing of deceased. The name Fiddletown was one of the names by which the location of the homicide was known.

The weight to be given to the evidence of the witness Neff was entirely with the jury.

Judgment and order affirmed.

We concur: ROSS, J.; THORNTON, J.; MORRISON, C. J.

SHARPSTEIN, J. I concur in the affirmance of the judgment and order appealed from. The record, in my opinion, discloses no substantial error.

McKINSTRY, J. I concur on the ground first considered by Mr. Justice MYRICK.

(65 Cal. 309)

In re Estate of DAVIS. (No. 8,178.)

Filed June 2, 1884.

An executor or administrator may renounce his claim to compensation for performance of the duties of his trust; and where a person having a prior right to administer relinquishes that right in favor of another, on his promise made before appointment that he will not charge for his services, this will be regarded as equivalent to a renunciation of his claim for compensation.

Recovery cannot be had for services voluntarily rendered, however great the benefit conferred.

Department 1. Appeal from the superior court of San Joaquin county.

J. H. Budd, for appellant.

August Muentzer, for respondent.

MCKEE, J. The surviving wife of the intestate was entitled, under the law, to administration of the estate, (section 1365, Code Civil Proc. ;) but upon a promise made to her by her eldest son that he would not charge for his services in administering it, she relinquished her right in his favor, and, upon filing her written consent to his appointment, he was appointed administrator. Having duly qualified, he administered; but in his final account he charged \$2,454.98 commissions for his services, which the court refused to allow; and it is contended that the refusal was error, because the law allows him his commissions notwithstanding his promise. It cannot be presumed, however, that in making the promise, under which he obtained his appointment, he intended to practice a deceit upon the court or the estate. Rather, it must be presumed that as he obtained the appointment upon the faith of his promise, he undertook the administration according to its terms, and with the intention to renounce his claim to the commissions which the law allowed him. There is no question that an executor or administrator, like any other trustee, may renounce his claim to compensation for performance of the duties of his trust; and a promise made by him before his appointment, that he will not charge for his services, may be regarded as equivalent to a renunciation of his claim.

It is conceded that the services rendered were beneficial to the estate and very satisfactory to the heirs. But they were voluntarily rendered; and it is a settled rule in law and equity that recovery cannot be had for services voluntarily rendered, however great the benefit conferred. *Bartholomew v. Jackson*, 20 Johns. 28; *White v. Jones*, 14 La. Ann. 681; *Lee v. Lee*, 6 Gill & J. 316. So, in *McCaw v. Blewit*, 2 McCord, Ch. 103, where an administrator had obtained his appointment on the express condition that he would not charge commissions, the chancellor refused to allow them, and the supreme court of the state affirmed his judgment, saying: "The administrator stipulated that he would not charge, and he cannot now be permitted

to violate that contract. That which was expressly declared to have been intended as a gratuity shall not now be converted into a demand."

Judgment affirmed.

We concur: ROSS, J.; MCKINSTRY, J.

65 Cal. 310

Ex parte BENJAMIN. (No. 10,970.)

Filed June 3, 1884.

The "county government act," so called, of May 14, 1883, repeals a similar act of March 13, 1883; and an ordinance passed on the sixteenth of May, 1883, is valid, and done under authority of the county government act.

In bank. Application for a discharge on *habeas corpus*.

H. M. Willis, for petitioner.

J. W. Satterwhite, for respondent.

ROSS, J. The petitioner is held for a violation of an ordinance adopted by the board of supervisors of San Bernardino county, imposing a license tax on, among other things, the sale of spirituous and malt and fermented liquors and wines in less quantities than one quart. The validity of the ordinance is the question in the case. It was adopted on the sixteenth day of April, 1883, by the board of supervisors, at a session which commenced on the seventh day of May, pursuant to section 4032 of the Political Code, which reads: "The regular meetings of the boards of supervisors must be held at their respective county seats on the first Mondays in May, August, November, and February of each year, and must continue from time to time until all the business before them is disposed of. * * *" The board not concluding its labors on the first day of its meeting, adjourned until the next, and so on from day to day until the sixteenth day of May, when the ordinance in question was enacted. In *Ex parte Benninger*, 12 Pac. C. L. J. 301, the same ordinance was under consideration, and it was then urged that it was invalid, because adopted at a time when the board was not legally in session. That contention was based on the claim that the session of the board, which it is conceded on all sides was legally commenced on the seventh of May, was put an end to by section 22 of the act commonly called "the county government act," which went into effect on the fourteenth of May, 1883, and which section 22 reads: "The board of supervisors must by ordinance provide for the holding of regular meetings of the board at their respective county seats." On the sixteenth of May, 1883, the board had not provided by ordinance for the holding of regular sessions. We held against the petitioner in the

Benninger Case, as we must do against the petitioner here. It is manifest that in order for the board of supervisors to provide by ordinance, as they are required to do by the county government act, for the holding of regular sessions of the board, there must be a meeting, at which such a provision may be made. The county government act must be construed with reference to the laws in force at the time of its enactment and taking effect. It did not, and clearly was not, intended to operate as a repeal of that provision of the Political Code providing for the regular meetings of the board of supervisors until the board should itself provide for the holding of such regular meetings. The meeting of the board of supervisors of San Bernardino county on the seventh of May, 1883, being a regular meeting, authorized by the section of the Political Code already cited, was a valid meeting, and authorized to adjourn from day to day until all of its business was disposed of. It was therefore legally in session on the sixteenth day of May, 1883, with power to do such acts as the then-existing laws conferred upon it. The question therefore arises, what were then its powers with respect to the imposition of license taxes? The county government act had then gone in force. By it the board of supervisors of San Bernardino county is empowered "to license, for purposes of regulation and revenue, all and every kind of business not prohibited by law, and transacted or carried on in such county, and all shows, exhibitions, and lawful games carried on therein; to fix the rates of license tax upon the same; and to provide for the collection of the same by suit or otherwise." Subdivision 27 of section 25. The act is one to provide a uniform system of county governments. Among other things, it treats of the "general permanent powers" of the boards of supervisors of the several counties, and declares specifically and at length what those powers are. Among them is the power to license—the provision in relation to which is above quoted. The power conferred by that provision includes all the power previously conferred upon the board by the act passed March 13, 1883, (St. 1883, p. 297,) and more. Nor, in the matter of licenses, did the legislature stop here. By the act passed, and which took effect, March 13, 1883, it had declared that the licenses therein provided for should be collected as then provided for "by the provisions of chapter fifteen, title seven, part three, of the Political Code of the state of California." By the county government act it empowered the board of supervisors to provide for the collection of the licenses imposed by virtue of the authority therein conferred, "by suit or otherwise." Again, the legislature, in the third section of the act of March 13th, declared:

"The board of supervisors of each county must, on the first Monday of October of each year, fix the rates of county licenses: provided, that, after the passage of this act, said board of supervisors of each county may at any general or special meeting of said board, held as required by law, fix the rates of said licenses up to the first Monday of October, A. D. eighteen hundred and eighty-three, and said licenses shall be collected at said rates for the year

eighteen hundred and eighty-three, until said rates are fixed on said first Monday of October, A. D. eighteen hundred and eighty-three."

In the subsequent act, to provide a uniform system of county governments, in which, as has been said, the general permanent powers of the board of supervisors of the several counties are specifically defined, there is no such limitation as to time. From all which we conclude that the act entitled "An act to provide a uniform system of county and township governments" superseded and repealed that of March 13, 1883. It results that the powers possessed by the board of supervisors of San Bernardino county, on the sixteenth day of May, 1883, were such as were conferred by the county government act; and this being so, it follows, further, that the ordinance adopted by the board on that day did not expire, as contended by the petitioner, at the time specified in the act of March 13, 1883; that is to say, the first Monday of October, 1883.

It should be added that the question of the repeal of the act of March 13th was not considered in *Benninger's Case*, the points there being that the ordinance was void,—*First*, because adopted at a time when the board was not legally in session; and, *secondly*, for the reason that it is unreasonable, oppressive, and in restraint of trade.

Prisoner remanded.

We concur: McKINSTRY, J.; MYRICK, J.; SHARPSTEIN, J.; MORRISON, C. J.

65 Cal. 583

MEYER v. BROWN. (No. 8,896.)

Filed June 4, 1884.

Judgment on former hearing in this cause (12 Pac. C. L. J. 153) affirmed.

In bank. Appeal from the superior court of Sacramento county.

This case was considered on a former hearing on demurrer to the petition for a writ of *mandamus*. The facts and opinion in that hearing are reported in 12 Pac. C. L. J. 153. This is an appeal on the merits.

Rosenbaum & Sheeline and *S. C. Denson*, for petitioner and appellant.

W. A. Anderson and *McKune & George*, for respondent.

BY THE COURT. We are satisfied with the opinion delivered when this case was considered on demurrer to the petition. 12 Pac. C. L. J. 153. The views then expressed are decisive of the case as now presented in favor of the petitioner. It is therefore ordered that a writ of mandate issue to the municipality and its authorities annu-

ally to levy and collect for municipal purposes, on all real and personal property within the city limits, except such as is exempt by law, a tax of 100 cents on the \$100, and that 55 per cent. of the revenue thus derived within the city limits for municipal purposes be set apart and appropriated to an interest and sinking fund, to be applied to the annual interest and final redemption of the bonds issued for the city indebtedness, in accordance with the act of the legislature of the state adopted April 24, 1858.

65 Cal. 320

FARRINGTON v. BROWN and another. (No. 8,250.)

Filed June 4, 1884.

In an action to enjoin a sheriff from levying on certain real property, under an execution issued on a judgment of the justice's court, on the ground that plaintiff was not bound by the judgment in that action, because she had not appeared in the same, the complaint does not state a cause of action, if it does not make some averment that plaintiff was not served or did not appear as a party defendant in such suit.

Department 1. Appeal from the superior court of San Joaquin county.

J. H. Budd, for appellant.

J. C. Campbell, for respondents.

By THE COURT. The appeal is from a judgment rendered on failure of plaintiff to amend her complaint, after an order of court sustaining a demurrer thereto on the ground that the complaint does not state facts constituting a cause of action. The action is brought to enjoin the defendant Brown, a constable, from selling certain real property of plaintiff under execution issued upon a judgment rendered and entered by a justice of the peace in an action wherein plaintiff was defendant and the present defendant Beiso was plaintiff. There is no averment in the complaint herein that copy of the original complaint filed in the justice's court, as well as copy of summons, was not served on the present plaintiff, nor that copy of the amended complaint in the action in the justice's court was not served on plaintiff, or on Patrick Farrington, (first named as a defendant in that action in the amended complaint,) nor even that the plaintiff or Patrick did not appear and answer such amended complaint. For aught that appears in the present complaint, the cause was tried in the justice's court upon the issues made by the amended complaint and the answers thereto of Patrick Farrington and Rosana Farrington, the plaintiff herein. This possibility, or presumption, is not removed by the statement in the present complaint that the plaintiff, Rosana, had no "knowledge" of the justice's judgment for more than 30 days after

its rendition. There is no legal presumption that she was personally present at the trial, or when the justice rendered or entered his judgment.

Judgment affirmed.

(65 Cal. 321)

HEALD v. HENDRY. (No. 9,514.)

Filed June 4, 1884.

Where a defendant in an action appears and demurs, and at the same time demands a change of venue on affidavits, and no counter-affidavits are filed, the legal effect of an order postponing the hearing of the motion for change of venue until defendant files his answer is to deny defendant's motion for a change of place of trial, and is ground for a reversal of that and subsequent orders.

Department 1. Appeal from the superior court of El Dorado county.

Wm. H. H. Hart, for appellant.

Geo. C. Blanchard, for respondent.

By THE COURT. The action was brought in the superior court of El Dorado county. Defendant demurred to the complaint, and, at the time he appeared and demurred, (Code Civil Proc. 396,) demanded in writing that the trial be had in San Francisco, the proper county. Upon due notice defendant moved for a change of the place of trial, upon affidavit that, at the commencement of the action and afterwards, he resided in the city and county of San Francisco, and no affidavit denying the statements of defendant's affidavit was filed on the part of plaintiff. When, on the twenty-seventh of October, 1883, defendant's motion came on to be heard, and after defendant's counsel had read the papers designated in his notice of motion, and the court had sustained an objection of defendant to the hearing of a cross-motion by plaintiff to retain the cause in El Dorado "for the convenience of witness," the court ordered "that further hearing of defendant's motion be postponed until defendant files his answer to plaintiff's complaint, and that plaintiff's cross-motion be heard at the time when the further hearing of defendant's motion is heard, and that said motion and cross-complaint may be brought on for final hearing upon ten days' notice by either party." This order, in its legal effect, was an order denying defendant's motion for a change of the place of trial. It effectually deprived him of his right to have his demurrer heard in San Francisco. *Cook v. Pendergast*, 61 Cal. 72.

The order of the twenty-seventh of October, 1883, must be reversed.

As the court erred in continuing the hearing of defendant's motion until he should file an answer, and as it appears from the bill of exceptions settled and certified by the learned judge below that

defendant on the seventeenth day of November, 1883, pursuant to the order of the court, "was compelled to and did serve and file his answer," it follows that the order of January 18, 1884, was erroneous.

Orders reversed.

65 Cal. 316

HYNES v. S. F. & N. P. R. Co. (No. 7,770.)

Filed June 4, 1884.

Where a boy is riding on a horse, along-side of a railroad track, and the horse, becoming frightened by a train, runs onto the track in front of the train, whereby the horse is killed and the boy injured, the railroad company is liable for such injuries if they are the result of its negligence in not maintaining the proper fences along the track, unless there was such contributory negligence on the part of the boy as would preclude a recovery. What is such contributory negligence is a question for the jury; and instructions which virtually take from them the determination of the questions whether the boy exercised such ordinary care and prudence as under the particular circumstances of the case would reasonably be expected of him, regard being had to his age or condition, are erroneous, and ground for a reversal.

Department 1. Appeal from the superior court of Sonoma county.

E. S. Lippitt and Barclay Henley, for appellant.

E. L. Whipple, for respondent.

Ross, J. John P. Hynes, a boy accustomed to work on his father's farm, through which the defendant's road is constructed, went, on a certain afternoon in 1879, to his father's barn, mounted a horse, and started in search of cows. He used no saddle, but, according to his own and other testimony in his behalf, he had on the horse a halter and bridle. The barn was not far from the railroad track, and, in going for the cows, it was necessary for him to cross the track. Between the barn and the track was an old fence, in which was a bend and two gates—one a small and the other a large one. He entered the space next the railroad through the small gate, and, according to his own testimony, when inside the gate, heard the noise of the cars and train, and saw them coming. "After I went through the little gate," said the witness, "I walked my horse down along the fence, into the angle near the big gate, about seventy-five feet from the railroad track—a quick walk. Then he [the horse] got frightened, and went to dash across the road, and was caught on the cow-catcher. I tried to hold him, but could not. He ran towards the little fence that goes towards the crossing, and jumped over it, and then onto the track; he was trying to cross the track ahead of the engine, and I fell on the cow-catcher in front, and the horse was dragged along the track. I never rode him without a bridle. I thought I was safe in that corner. I was twenty-five feet from the big gate. I had worked the horse hauling hay, and mowed with him in sight of the track; never ran before, or gave any trouble about the cars. We had him about two years. Did not know of the time

of the Sunday train commenced. Did not exactly know what hour the train would be down that day. I was hurt; had my left leg broken, and was sick about ten months before I could do anything." The horse was killed. Two actions have grown out of the occurrence,—one on the part of John P. Hynes, by his guardian, to recover of the railroad company damages for the personal injuries sustained by him, and the other by James Hynes, the father of John, and the owner of the horse, to recover of the railroad company for the loss of the horse, and for the loss of the services of his son, and for medical attendance, etc.

By a statute of this state the railroad company was required to make and maintain a good and sufficient fence along its track, and this duty the company in question failed to perform. The statute reads:

"Railroad corporations must make and maintain a good and sufficient fence on either or both sides of their track and property. In case they do not make and maintain such fence; if their engine or cars shall kill or maim any cattle or other domestic animals upon their line of road which passes through or along the property of the owner thereof, they must pay to the owner of such cattle or other domestic animals a fair market price for the same, unless it occurred through the neglect or fault of the owner of the animal so killed or maimed." Civil Code, § 485.

It is obvious that the purpose of the statute in requiring railway companies to make and maintain such fences is to prevent collisions with cattle and other domestic animals, and that it has no application to ordinary cases in which an individual suffers any injury. The statute having imposed on the defendant the duty of making and maintaining the fences, and defendant having wholly failed in its duty in that particular, there can be no doubt, we think, of the liability of defendant for the loss of the horse, if there was no such negligence on the part of John P. Hynes in riding the horse as and where he did as precludes a recovery. *C. & A. R. Co. v. Utley*, 38 Ill. 411; Whart. Neg. (2d Ed.) § 889.

In the Illinois case the mare of the plaintiff was being driven at night and, becoming frightened, ran away, separated herself from the vehicle, and was found the next morning, not very far from the point where she took fright, dead on the track of the railroad. The real question presented by the evidence in the case was whether the cattle-guard at the crossing, near which the mare was killed, and the fences along the line of the road, were good and sufficient,—the court holding that if the fence or cattle-guard was not such as the law required, at the point where the mare came upon the railroad, that fact alone would render the company liable. Precisely the same reason that made the company liable for the death of the mare would have made it liable for the destruction of the vehicle, had it remained attached to her and been destroyed, and also for the death or injury of its occupants. So, here, if John P. Hynes was without fault, and the defendant is liable for the loss of the horse by

reason of its failure to make and maintain the fence required by the statute, no reason is perceived why it is not also liable for the injury to the boy carried on the back of the runaway horse. The real question, therefore, in our opinion, is whether there was such contributory negligence on the part of the boy as precludes a recovery for the injury to him as well as for the loss of the horse. And that was a question peculiarly for the jury, under proper instructions from the court. It was not a case where the boy was so plainly guilty of contributory negligence as that the court would be justified in saying, as a matter of law, that he could not recover, nor, on the other hand, was the court justified in instructing the jury, as it did, that if the boy "was riding a horse, which he had reason to believe and did believe to be gentle and not afraid of the cars, on the land of his father, when the horse became frightened by the cars and dashed upon the track, and plaintiff was struck," and that if defendant had built and maintained the fence required by the statute the collision would not have occurred, they should find for the plaintiff.

There was also error on the part of the court in charging the jury that if the boy was on the premises of his father "at a point where a passing train could not injure him, upon a horse he was accustomed to ride, and believed to be gentle and not afraid of the cars, and if the horse became alarmed at the train, and unmanageable, and dashed upon the track with him, the same not being fenced, when it was beyond his power to prevent it or to dismount, then I charge you that in making up your verdict it does not matter whether he saw or heard the cars, or bell, or whistle before the horse became frightened or not." By these instructions the court virtually took from the jury the determination of the question of contributory negligence. It was for the jury to say whether the boy exercised such ordinary care and prudence under the particular circumstances of the case as would reasonably be expected of him,—regard, of course, being had to his age and condition.

Judgment and order reversed, and cause remanded for a new trial.

McKINSTRY, J. I concur.

McKEE, J. I concur in the judgment.

HYNES v. S. F. & N. P. R. Co. (No. 7,771.)

Filed June 4, 1884.

On the authority of *Hynes v. S. F. & N. P. R. Co.*, ante, 28, judgment reversed.

Department 1. Appeal from the superior court of Sonoma county. The facts in this case are found in *Hynes v. S. F. & N. P. R. Co.*, ante, 28.

E. S. Lippitt and Barclay Henley, for appellant.

E. L. Whipple, for respondent.

By THE COURT. On the authority of *Hynes v. S. F. & N. P. R. Co.*, ante, 28, judgment and order reversed, and cause remanded for a new trial.

65 Cal. 313

BOORMAN v. CITY OF SANTA BARBARA. (No. 9,201.)

d June 4, 1884.

Under the act of March 26, 1878, authorizing the common council of Santa Barbara to lay out, etc., * * * streets, they are not authorized to improve or lay out more than one street in one proceeding; nor to improve or lay out any, except on a petition signed by a majority of the frontage of property owners on such street.

The act of March 26, 1878, is unconstitutional and void, because it provides no process or notice to be served upon the persons whose property is to be charged with assessments for street work.

Department 1. Appeal from the superior court of Santa Barbara county.

Thomas McNulta, for appellant.

Hall, Requia & Huse, for respondent.

By THE COURT. 1. The act of March 26, 1878, (St. 1877-78, p. 777,) authorizes the common council of the city of Santa Barbara to lay out, etc., any one street between certain *termini*, upon presentation of a petition signed by the owners representing a majority of the frontage "upon the proposed improvement." The act does not contemplate the presentation in one petition of a prayer or demand for the improvement or laying out of more than one street, nor empower the council "to open, extend, widen, straighten, or close up" a great number of streets in one proceeding. Such is not the ordinary meaning of the language of the act; and a construction which would give legality to proceedings like those reviewed by the superior

court herein would lead to complications well illustrated by the history of the present case.

2. Even if it should be conceded that the act authorizes the closing of a number of streets greater than one, and the opening or straightening or widening of other streets, in one proceeding, it requires a petition to be presented, signed by owners of a majority of the frontage upon each separate street. Otherwise it might happen that a street would be opened against the wish of every one of the owners of property fronting on that street.

3. The power of the council to act depended upon the presentation of a petition such as the act requires.

4. We agree with the court below that the act of March 26, 1878, is unconstitutional and void. It provides for no process or notice to be served upon the persons whose property is to be charged with assessments. The only provision as to notice is:

"The commissioners shall give notice of the time and place where they will proceed to examine the property *to be affected* by such improvements by an advertisement in one newspaper published in said city, such time not to be *more* than ten days after the day when said notice shall first be published." Section 1.

Conceding (for the purposes of this opinion *only*) that a time *not more* than 10 days must be at least *one day*, and that a law which provided for but one day's publication of notice would not be held obnoxious to the objection that it practically deprives the citizen of all notice, the act we are analyzing provides for no notice at all addressed to any particular person or class of persons, or which would inform any particular person that, on failure of appearance, any burden would be imposed upon *him* or his property. It will be observed the act neither fixes the boundaries of an assessment district nor authorizes the common council to fix them. That power is conferred upon the commissioners, to be appointed by the council, who are to determine the limits of the assessment district when they shall have ascertained what property will be benefited by the "improvement." It is possible, if the commissioners were authorized to fix the limits of the assessment district, finally or conditionally, in the first instance, and then to give notice, even by publication, to the owners of property within the district, the process would be sufficient. But the act provides only for notice, at most, to all property owners in Santa Barbara. Who can know that *his* property may, by the commissioners, be deemed to be benefited by the proposed improvements? The commissioners are only required to give notice to the world that at a certain time and place "they will proceed to examine the property to be affected." And having given notice of an intention to examine the property to be affected, the law provides that, at the time and place mentioned in the notice, they shall "proceed to examine the land

and improvements to be effected [affected] by the proposed improvement, and shall first ascertain the amount of damages to be sustained, the names of the owners of the property to be damaged, and the amount to be paid to each of such owners thereof. They shall then assess *upon the property to be benefited* by such improvement a sufficient sum to pay the whole amount of said damages and the fees of said commissioners, and shall apportion the same among the owners of the several parcels of property to be thus benefited in proportion to the *amount of benefits* to accrue to each." Can it be said that the scheme provides any notice to those who own property within the limits of an assessment district not established when the only notice is given?

Judgment affirmed.

(65 Cal. 326)

COCKRILL v. HALL. (No. 8,088.)

Filed June 6, 1884.

A complaint which states that a defendant received from the plaintiff a certain promissory note for the purpose of renewing the same, and that he kept said note until action upon it was barred by the statute of limitations, and then refused to pay it on that ground, states a cause of action. A fraudulent promise, which induces a person to act in such a way as to affect his legal right, or to alter his position to his injury or risk, is actionable.

Department 1. Appeal from the superior court of Sonoma county.
Henly & Oates, for appellant.

Geo. A. Johnson, for respondent.

McKEE, J. The action in hand was brought under sections 1709, 1710, of the Civil Code, to recover damages for a deceit. There was a demurrer to the complaint, which the court sustained, upon the ground that the complaint did not contain facts sufficient to constitute a cause of action. The statement shows that on the third day of April, 1880, the plaintiff, being the owner and holder of a promissory note made by the defendant, demanded of him immediate payment of a balance of principal and interest due upon it. The defendant was not ready to pay, but he promised the plaintiff if she would let him take the note home with him he would compute the amount due upon it, and would next day renew it, with security, or return it. Upon this promise the plaintiff handed the note to the defendant, who, instead of renewing it next day or returning it, as he had promised, kept it until the statute of limitations barred an action upon it, and then refused to pay because it was barred by the statute. It is charged that the defendant, when he made the promise, intended not to perform

it, but made it falsely for the purpose of deceiving the plaintiff, getting possession of the note, and preventing the plaintiff from suing upon it. This was a sufficient statement of a cause of action. A fraudulent promise which induces a person to act in such a way as to affect his legal right, or to alter his position to his injury or risk, is actionable, under sections 1709, 1710, Civil Code.

Judgment reversed and cause remanded, with direction to the court below to overrule the demurrer.

We concur: ROSS, J.; MCKINSTRY, J.

SUPREME COURT OF CALIFORNIA.

65 Cal. 322

LYON, Adm'r, v. PETTY and others. (No. 6,976.)

Filed June 6, 1884.

Where an action is brought by the administrator of an intestate to foreclose a mortgage, which matured after the death of such intestate, the mortgagor cannot set off a cross-demand in his favor and against such intestate, which was due and payable at the time of the death of the latter, as a compensation of the debt on the mortgage, nor can it be set off at all if the same is barred by the statute of limitations.

Promissory notes assigned before maturity, upon which there is an existing cause of action at the time of commencement of plaintiff's action, may be set up in such action as a counter-claim by the assignee; where the assignment is made after maturity, they are taken by the assignee subject to existing equities between the maker and payees, and, under these circumstances, could not be pleaded as a counter-claim.

Department 1. Appeal from the superior court of San Joaquin county.

Budd & Budd, for appellant.

Byers & Elliot, for respondents.

McKEE, J. On February 27, 1876, Kate Rodgers died intestate. At the time of her death she was owner and holder of a promissory note for \$3,000, dated December 20, 1875, and due and payable, with interest at 10 per cent. per annum, two years after date; payment of which was secured by mortgage upon real estate. The note matured December 20, 1877, nearly 20 months after the death of its owner and holder; and the administrator of her estate, on March 29, 1879, commenced the action in hand for foreclosure of the mortgage to satisfy the same. To the complaint in the action the defendant answered that, at the death of said intestate, he was the owner and holder of four promissory notes against her,—one for the sum of \$2,000, due and payable January 13, 1875; another for the sum of \$192, due and payable May 1, 1875; another for the sum of \$180, due and payable August 1, 1875; and the fourth for the sum of \$300, due and payable February 18, 1876,—each bearing interest at the rate of 1 per cent. per month from maturity until paid, except the note of \$2,000, which bore interest at the rate of $1\frac{1}{4}$ per cent. per month from its date, payable semi-annually, and he asked as relief that the said notes, as they existed on the day of her death, be set off against his note in suit, and that the two demands be compensated.

The defense invoked by the answer is not founded upon the notes as claims against the estate. They have never been presented to the administrator of the estate for allowance or rejection, as required by law for payment of debts due by the estate in the course of administration. But the right asserted is this: that the notes constituted

demands against the intestate on the day of her death, and that, without verifying and presenting them for allowance or rejection as claims against her estate, he, as the owner and holder of the same on that day, had the right to use them as compensation of the mortgage debt which he then owed to her. This right is claimed upon section 440 of the Code of Civil Procedure. The section provides:

"Where cross-demands have existed between persons, under such circumstances that, if one had brought an action against the other, a counter-claim could have been set up, the two demands, so far as they equal each other, shall be compensated; and neither can be deprived of the benefit thereof by the assignment or death of the other."

Under this section, cross-demands, as the subject of set-off, must be of such a nature as to constitute a counter-claim. A counter-claim is what the law declares it to be. Section 438, Code Civil Proc., declares that the counter-claim mentioned in section 437 must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. (2) In an action arising upon contract; any other cause of action arising also upon contract and existing at the commencement of the action. This section, 438, and section 440, Code Civil Proc., are the counterparts of sections 47 and 48 of the old practice act, under which it was held, in *Naglee v. Palmer*, 7 Cal. 543; *Russell v. Conway*, 11 Cal. 93; and *Hobbs v. Duff*, 23 Cal. 596, that a demand to be used to compensate another must be such as would constitute the subject-matter of the statutory counter-claim; and that counter-claims differ from the equitable right of set-off, which requires some peculiar circumstances, based upon equitable grounds, such as fraud, insolvency, or the like, to warrant the interference of the court.

Both the statutory and the equitable right, however, are founded in the idea that mutual existing indebtedness, arising out of contracts between parties to the record, created a compensation or payment of both demands so far as they equal each other. But under the Code the two demands must be mutual and co-exist as separate causes of action at the commencement of the action upon the principal demand. In this case the demands, as enforceable causes of action, did not co-exist, neither at the time of the death of Kate Rodgers nor at the commencement of the action against the defendant by her administrator. They did not at the time of her death, because the mortgage debt, which was the subject-matter of the action, did not mature until 20 months after her death, and, at the day of her death, there was no cause of action upon it. Nor did they at the commencement of the action by the administrator, because, at that time, the time of the statute of limitations had run upon the \$2,000 note in the hands of the defendant, and the cause of action upon it was barred. Being

barred by the statute at the commencement of the action upon the principal claim, it did not constitute a cause of action existing at the commencement of the action upon which a counter-claim was maintainable. *Belleau v. Thompson*, 33 Cal. 495; *Stoddard v. Treadwell*, 26 Cal. 310; *Paige v. Carter*, 2 PAC. REP. 260; *Carpentier v. City of Oakland*, 30 Cal. 439. Besides, while the answer sets forth facts which show that the defendant came to the possession of the four promissory notes by assignment, it does *not* set forth facts which show *when* they were assigned to him. After setting forth the execution and delivery of the notes by the maker, and the times of their maturity and their non-payment, it is averred that they were assigned before the death of the maker; but whether before or after the maturity of the notes does not appear. If the notes were assigned before maturity they would have constituted the subject-matter of a counter-claim, if a cause of action could have been predicated upon them at the commencement of the plaintiff's action. But if after maturity, the assignee took them subject to all existing equities between the maker and the payees, and, under such circumstances, they would not be the subject of a counter-claim, and, as such, could not be pleaded under section 438 of the Code of Civil Procedure. "To allow a set-off in such a case," said the court, in *Duff v. Hobbs*, 19 Cal. 659, "would be in conflict with the provisions of section 47, (now section 438, *supra*;) hence it has been decided that in such a case the set-off cannot be pleaded as a counter-claim, but must be set up as an equitable defense, on the ground that the assignee takes the demand subject to an existing equity. *Ferreira v. Depew*, 4 Abb. Pr. 131."

It follows that the answer as a pleading was defective, and the court should have sustained the demurrer to it.

Judgment reversed and cause remanded for further proceedings.

We concur: ROSS, J.; MCKINSTRY, J.

2 Cal. Unrep. 325

NELSON v. FLOYD. (No. 7,644.)

FRASER v. NELSON and another. (No. 7,644)

Filed June 13, 1884.

An order granting a new trial, where the evidence was substantially conflicting, will not be disturbed on appeal.

Department 1. Appeal from the superior court of Lake county.
Cape & Boyd and *T. A. O'Brien*, for appellant.
John S. Bugbee, for respondent.

By THE COURT. Appeals from an order granting a new trial. The decision and judgment, which the court set aside, were founded upon

substantially conflicting evidence, bearing upon the main questions, as issue between the parties, as to the existence and extent of the subordinate claims and liens against the building in controversy; and as the court set the judgment aside and granted a new trial upon the ground that the evidence was insufficient to justify them, this court, in the absence of a manifest abuse of discretion, will not disturb the order. *Gutierrez v. Brinkerhoff*, 9 Pac. C. L. J. 734; *Blum v. Sunol*, 11 Pac. C. L. J. 275; *Pierce v. Schaden*, 55 Cal. 406; *Bronner v. Wetzlar*, Id. 419.

Order affirmed.

(65 Cal. 327)

BANK OF HEALDSBURG v. BAILHACE and Wife. (No. 7,620.)

Filed June 11, 1884.

Delivery of a deed is essential to pass title, and a deed takes effect only from the delivery, and is complete only by a delivery on the part of the grantor and acceptance by the grantee.

Until the deed of a married woman is acknowledged and certified according to sections 1186 and 1191, Civil Code, it has no validity, and is not in a condition to be delivered or accepted. A deed which is delivered in presence of a notary without such formalities, and is thereafter acknowledged and certified before him, is void.

The settlement of a defalcation to a bank, and the acceptance of a deed of real estate in satisfaction and release, are not transactions which fall within the ordinary powers of a corporation, which may be exercised by its agents, or persons who are held out to the public as such. Power to do such acts must be conferred by the board of directors.

Department 1. Appeal from the superior court of Sonoma county.
Geo. A. Johnson, for appellant.

J. H. McGee and *L. A. Norton*, for respondents.

McKEE, J. The existence and validity of a deed, as translativ of the title of a married woman to a tract of land held as her separate estate, is the question presented for consideration in this case. Josephine Bailhace, the wife of her co-defendant, John Bailhace, was seized in fee as her separate property of the land described in the pleadings. On the twelfth of June, 1880, she executed a deed of it to the plaintiff. Delivery of the deed at the time of its execution is affirmed by the plaintiff and denied by the defendants. If it was not delivered it is not her deed, for one of the essential requisites of a good deed is that it be delivered by the grantor or his attorney. A deed takes effect only from its tradition or delivery; and if it wants delivery it is void *ab initio*. 2 Bl. Comm. 308; *Barr v. Schroeder*, 32 Cal. 610. "Delivery is either actual, *i. e.*, by doing something and saying nothing, or else verbal, *i. e.*, by saying something and doing nothing; or it may be by both. And either of these may make a good delivery and perfect deed; for otherwise, albeit it be never so well sealed and written, yet is the deed of no force. And though the party to whom

it is made take it to himself, or happen to get it into his hands, yet will it do him no good, nor him that made it any hurt, until it be delivered. And a deed may be delivered by the party himself that doth make it, or by any other by his appointment or authority precedent, or assent or agreement subsequent, for *omnis rati habitio mandato æquiparatur.*" 1 Shep. Touch. 57.

Here the deed was well executed, and, after its execution, it was placed in the hands of a person who was, at the time he received it, a director of the Bank of Healdsburg; but when he received it the grantors forbade him from delivering it to the bank until the consideration for which it had been executed was fully arranged between them and the bank. This action by the defendants involved or resulted in a disagreement as to what was the consideration. But, notwithstanding the disagreement, the plaintiff contends that the deed was in fact delivered in the circumstances attending its execution. The circumstances were these:

John Bailhace was cashier and one of the directors of the bank of Healdsburg; at the same time Jonas Bloom was president and also one of its directors. While acting as cashier, Bailhace had overdrawn his account with the bank to the extent of about \$10,000, and he owed the firm of Bloom & Cohn (of which firm Jonas Bloom was a member) \$12,300, secured, in part, by stock in said bank belonging to the debtor. When the amount of Bailhace's overdraft was discovered the directors of the bank verbally notified him that he must make his account good or resign. Upon this notification, Bailhace made out his resignation, signed it, and delivered it to one of the directors. There was no meeting of the directors called to consider it, nor does there appear to have been any official notice taken of the delinquency or the resignation. While the matter stood in that condition, Bailhace informed two of the directors that he had induced his wife to convey her land to the bank in satisfaction of his debt, in consideration that the bank would release him from the debt, loan him the further sum of \$500, and retain him as cashier at a salary of \$100 per month. Upon that information the two directors returned to him his resignation, delivered him the key of the bank, and restored him to his position as cashier. This was done "with the individual consent of each director."

For the purpose of completing the arrangement, Mrs. Bailhace and her husband met with two of the directors, ready to execute and deliver their deed. A deed in proper form was prepared. The husband executed and acknowledged it, and immediately handed it to one of the directors for the signature and acknowledgment of his wife. When the deed was laid before her she refused to sign, but, after a brief hesitation, she signed it in the presence of Bloom, the president of the bank, and *passed it to him*, and he passed it, "at once," to a notary who was present to take her acknowledgment. She acknowledged the deed according to the legal ceremony, and the notary took

it to his office to append his certificate. Having attached his certificate in due form, he started with the deed to deliver it, in its completed form, to Mrs. Bailhace. On the way he met with one of the directors of the bank, named Wilson, to whom he handed the deed. But as soon as Wilson received it, the defendants called to him and told him not to deliver it until matters between them and the bank were fully arranged. Wilson promised to do as they requested; and he took the deed home with him, and kept it from the day he received it from the hands of the notary until the sixteenth of June, 1880, when he returned it to Mrs. Bailhace, upon her demand. She afterwards refused to deliver it, because, as she declared, the president of the bank had not kept faith with her in carrying out the arrangement upon which she had consented to execute it.

Whether the reason she gave was true or false has no direct bearing on the question of the delivery of the deed arising out of the circumstances attending its execution. The contention of the plaintiff, that the deed was delivered when Mrs. Bailhace signed it in the presence of the notary and silently passed it to Bloom, the president of the bank, cannot be successfully maintained; for, although signed, the deed was not acknowledged and certified according to law; and until the deed of a married woman is acknowledged and certified according to the formalities prescribed by sections 1186, 1191, of the Civil Code, it has no validity, and is not in a condition to be delivered or accepted. "If a man seal and acknowledge, before a mayor or other officer appointed for that purpose, a writing for a statute or recognizance, this acknowledgment before such officer shall not amount to a delivery of the deed, so as to make it a good obligation, if it happen not to be a good statute or recognizance." 1 Shep. Touch. 58. Nor did a delivery take place when the notary handed the deed, as a completely executed deed, to Wilson, one of the directors of the bank, who, when he received it, promised not to deliver it until matters between the parties to it were arranged. In receiving and promising thus to hold it, Wilson acted as the depository of the deed and as the agent of Mrs. Bailhace. As her agent he had no authority to deliver it until he received instructions from her to that effect. No such instructions were given to him, and he recognized his position by afterwards returning the deed to his principal. *Fitch v. Bunch*, 30 Cal. 208. Besides, to constitute delivery of a deed there must not only be delivery by the grantor, but an acceptance by the grantee. In the case in hand the minds of grantor and grantee seem never to have met upon the subject of the execution and delivery of the deed in settlement of the affairs of the bank, for neither before nor after the discovery of the deficit in the accounts of the cashier was there any meeting of the board of directors to consider the accounts; and at no time during the individual transactions of some of the directors with the cashier in relation to his accounts with the bank, or the possession of the deed by Wilson, did the board of directors, at a regular meeting, by resolution or otherwise,

authorize a settlement with the cashier upon a basis of a conveyance to the bank by Mrs. Bailhace of her separate real estate. Power to make such a settlement and to accept such a deed for that purpose was a function of the board of directors, and not of the president of the bank nor of any individual director nor executive officer. The attempt by an individual officer to exercise such a function, without the assent and authority of the board of directors expressed at a regular meeting, was therefore irregular, and beyond the sphere of his action.

Crowley v. Genesee Manuf'g Co. 55 Cal. 275; *McKiernan v. Lenz*, 56 Cal. 61; *Seeley v. San Jose M. & L. Co.* 59 Cal. 23; and *Shaver v. Bear River & A. W. M. Co.* 10 Cal. 400, are not in conflict with this conclusion. Those causes were decided upon the broad principle that, while the authority of all officers or agents of a corporation must be limited to such modes of binding the corporation as result from the nature of their duties and the powers conferred upon them, yet where the corporation itself holds out to the public that its officers or agents have authority to act according to the general usage, practice, and course of its business, the acts of such agents within the scope of such usage, practice, and course of business will be binding upon the corporation in favor of third persons possessing no knowledge to the contrary. But the settlement of a defalcation to a bank, and the acceptance of a deed of real estate in satisfaction and release, are not transactions which fall within the ordinary powers of a corporation, which may be exercised by its agents or persons who are held out to the public as such. Power to do such acts must be conferred by the board of directors. *Gashwiler v. Willis*, 33 Cal. 11; *Blen v. Bear River Co.* 20 Cal. 602.

Judgment affirmed.

We concur: McKINSTRY, J.; ROSS, J.

65 Cal. 332

In re Estate of CROZIER, Deceased. (No. 9,063.)

Filed June 17, 1884.

An appeal from a judgment of revocation of a purported will by the named executor does not operate as a stay on the power of the court to appoint a special administrator.

The appointment of a special administrator is not a proceeding upon an order of revocation of the probate of a purported will, nor upon matters embraced therein, but is a separate and independent order, which is itself appealable.

An order of revocation of the probate of an alleged will and of letters testamentary is an appealable order, and therefore the statute keeps alive, *ad interim*, appellant's character as executor for the purposes of the appeal; but in all other respects the powers and functions of the former executor are suspended when the revocation is entered.

Department 1. Proceeding on writ of *certiorari*.

Cal.Rep. 1-4 P.—34

W. L. Dudley, Campbell & Muerte, and Byers & Elliot, for petitioner.

By THE COURT. On the twenty-sixth of November, 1881, an instrument, purporting to be the last will and testament of deceased, was admitted to probate, and letters testamentary issued to *Daggett*, named in said instrument as executor, without bond. May 29, 1883, on the petition of Jane Crozier, mother of deceased, a judgment or order was made and entered annulling and revoking the probate of the alleged will. *Daggett* (the alleged executor) served and filed notice of an appeal from the judgment or order revoking the probate, and filed the \$300 bond on the fourteenth of June, 1883. On the same day (but, as we will presume, if necessary, *before* the appeal) one *Fyfe* was appointed special administrator, and his bond as such fixed at \$23,000. The present is an original proceeding to review and annul, on *certiorari*, the last-named judgment or order.

It is insisted by petitioner that his appeal stayed all further proceedings in the court below, based upon, or having relation to, the order of revocation. Code Civil Proc. 946. The contention, in its logical results, is that the will still remains the probated will of decedent, and the petitioner still the acting executor, with power to collect assets, pay debts, and do all other acts and things which an executor may do. But the effect of an appeal from an order setting aside a judgment is not to revive the judgment. The judgment no longer exists, so far as the assertion of any rights under it is concerned, until it shall be brought into force again by a reversal of the order setting it aside. The effect of an appeal is to stay all proceedings upon a judgment or order appealed from. Section 946. But the appointment of a special administrator was not a proceeding upon the order of revocation, or upon matters embraced therein, but an independent order which was itself appealable. Section 963. The Code does not provide that an order appealed from shall cease to exist,—be annulled,—but that it cannot be further enforced by a proceeding upon it. Here the revocation of probate, and the surcease of appellant's functions as executor, became complete *eo instanti* the order of revocation was entered. Code Civil Proc. § 1331. As was said with reference to the effect of an appeal from a certain order in *Wood v. Dwight*, 7 Johns. Ch. 295, an appeal only stays further proceedings; but here there is no further proceeding. The Code provides for an appeal from the order of revocation, and therefore the statute keeps alive, *ad interim*, appellant's character as executor for the purposes of the appeal; but in all other respects the powers and functions of the former executor are suspended when the revocation is ended. *Id.* If his powers can be fully revived by an appeal, he can not only control the orders of the lower court, but, of his own volition, recreate himself an executor.

In *Merced Mining Co. v. Fremont*, 7 Cal. 132, it was said that it was only of orders which command or permit some acts to be done

that a stay of proceedings can be had. That was an appeal from an order dissolving an injunction, but the principle applies here.

We think the superior court had jurisdiction to appoint a special administrator.

The order which the petitioner asks to annul is affirmed.

65 Cal. 343

READ v. RAHM and another. (No. 9,524.)

Filed June 17, 1884.

A declaration of homestead, declaring that "the cash value of the premises is \$3,000," is a sufficient "estimate of their actual cash value" to satisfy the requirement of the Code.

An indebtedness to a family for board is due to the community, and the husband cannot make a gift to the wife of what may become payable thereon in the future, on the principle that a gift is not consummated without delivery, and the subject of it must therefore be *in esse*.

Where, by mutual agreement of plaintiff, her husband, and her father, a conveyance is made to her with intent that the property should become her separate property, in consideration of an indebtedness by the father to the community, held that, in the absence of fraud, such conveyance operated as a gift to her.

The question of fraudulent intent is one of fact, not of law.

Department 1. Appeal from the superior court of Yolo county.

This is an action to restrain the defendant, as sheriff, from selling two parcels of land on an execution against plaintiff's husband and her father, on the ground that one parcel of such land is a homestead, and that the other is her separate property, derived by conveyance from her father to her, with consent of her husband, in consideration of an indebtedness from the father to the community. The other facts are stated in the opinion.

W. B. Treadwell and *W. C. Van Fleet*, for appellant.

J. C. Ball, for respondent.

BY THE COURT. The action is to restrain the defendant Rahm, as sheriff, from selling two parcels of land upon an execution issued upon a judgment in favor of the defendant Farris and against A. G. Read, plaintiff's husband, and W. H. Welsh, her father. It is alleged and found that the sheriff is about to sell the two tracts in one description.

1. The tract first described in the complaint has been the *homestead* of plaintiff's husband and herself since the twenty-ninth day of May, 1879, unless, as contended by appellants, (defendants,) the homestead declaration is *void*. The statement in the declaration with respect to the value of the premises is "that the cash value of the said above described premises is three thousand dollars."

2. The statute requires (3) "a description of the premises; (4) an estimate of their actual cash value." Civil Code, 1263. It seems

to us no one could understand a statement that certain premises were of the cash value of \$3,000 as anything else than a statement that the sum named was their *actual* cash value. It is true it is not to be *presumed* that a statute contains meaningless phrases having no significance, and some effect, if possible, must be given to every word. *Cory v. Hyde*, 49 Cal. 472; *Langenour v. French*, 34 Cal. 98. But when a statutory right can be acquired by the execution of an instrument, the instrument is sufficient in form if it contains every substantial statement required by the statute. The "value" of a tract of land is its true and absolute value. The value is its actual existing value, as opposed to its potential or possible value.

3. There can be no doubt that any indebtedness due from Welsh, for board of himself and sons, was due to the community. Nor could the husband make a gift to his wife of his interest in what should be paid by Welsh for such board in the future. He could not give that which he had not yet acquired. A gift is not consummated without delivery; the subject of it must therefore be *in esse*. 2 Kent, Comm. side p. 438. But the court below found, and there was evidence to sustain the finding, that, after a settlement, there was found to be due from Welsh, for board and for certain services rendered by plaintiff, the sum of \$1,662, "and by mutual understanding and agreement between said plaintiff, her husband, and her father, said deed (of the tract last described in the complaint) was made by her father to her," etc. There is no allegation in the answer of any fraud on the part of the husband, or that the property was conveyed to her to defraud *his* creditors. The averment is that the plaintiff confederated with her father that he should make the conveyance, and she receive it, to defraud the father's creditors. The transaction may be treated as a purchase by the husband; the consideration of the conveyance being an indebtedness due the community. The consent of the husband that the conveyance should be made to the wife, with the intent that it should become her separate property, operated as a gift to her. *Higgins v. Higgins*, 46 Cal. 259. The court below found that the conveyance by Welsh to plaintiff was not made with intent to hinder, delay, or defraud defendant Farris, or any creditor. The question of fraudulent intent is one of fact, and not of law. Civil Code, 3442. There was at least a substantial conflict in the evidence with reference to the intent wherewith the conveyance was made.

Judgment and order affirmed.

SUPREME COURT OF CALIFORNIA.

65 Cal. 334

LEARNED v. TANGEMAN. (No. 7,660.)

Filed June 17, 1884.

In an action between riparian proprietors, an instruction which in effect told the jury that the defendants were entitled to divert and use all the water of a stream, if necessary for the irrigation of their land, without regard to the wants or necessities of the other riparian proprietors, is erroneous, and ground for a reversal.

Department 1. Appeal from the superior court of Stanislaus county.

J. H. Budd and S. L. Carter, for appellant.

F. T. Baldwin and J. C. Campbell, for respondent.

BY THE COURT. This is a water contest between two riparian proprietors. The court below instructed the jury that if they believed from the evidence that the defendants were riparian proprietors, and used the water of the stream for the purpose of irrigating their lands, *and used no more than was necessary for that purpose*, and returned the surplus water after such use into the channel, then they should return a verdict for the defendants. This was error, for by it the jury was in effect told that the defendants were entitled to divert and use *all* of the water of the stream, if necessary for the irrigation of their lands, without regard to the wants or necessities of the other riparian proprietors.

Judgment and order reversed and cause remanded for a new trial.

LEARNED and others v. CASTLE and others. (No. 7,762.)¹

Filed June 17, 1884.

When an action to abate a nuisance and for damages is tried by a jury, the general verdict for damages includes a finding in favor of plaintiff upon all the issues; and the judgment, besides adjudging damages in the amount found by the jury, may order an abatement of the alleged nuisance.

The supervisors of a county cannot authorize a road-master to do an unlawful act; and their direction to do a lawful act, which operated an injury, would constitute no defense, unless, at least, it affirmatively appeared the work could not be done equally well in such manner as would not produce injurious results.

Where, by a complaint, two separate nuisances are charged, and no objection is taken, either by demurrer or answer, that the two causes of action were improperly united, or that the defendants were improperly joined, the objections will be deemed to have been waived.

Actual possession is *prima facie* evidence of ownership; and one in possession may maintain action upon a nuisance which injuriously affects his enjoyment of the possession.

The court is, under the Code, authorized to instruct a jury, if they render a general verdict, to find upon particular questions of fact.

¹ Reversed in banc. See 7 Pac. 34, 67 Cal. 41.

Department 1. Appeal from the superior court of San Joaquin county. Action to abate a nuisance caused by banking up canals, ditches, etc.

F. T. Baldwin, J. C. Campbell, J. H. Budd, and J. B. Hall, for appellant.

Terry & McKinne and W. L. Dudley, for respondent.

BY THE COURT. 1. "The preventive remedy for nuisances, aside from abatement by act of the party, is by injunction issued out of a court of equity. * * * Now the only remedy for the abatement of a nuisance, except where specific provision is made therefor by statute, is in a court of equity." Wood, Nuis. 679. The injunction may be *mandatory*, and direct the abatement. Id. 786. Of course, when a statute expressly authorizes a judgment to abate the nuisance, in a common-law action of tort for a private nuisance—as in Massachusetts, (*Codman v. Evans*, 7 Allen, 433,)—the power of the court to render such a judgment in an action at law is derived *solely* from the statute. In this state it was held that the district court had jurisdiction to abate a nuisance, and to decree damages, notwithstanding the former constitution expressly gave like jurisdiction to the county court, because such an action is in equity, and the district courts had jurisdiction in all equity cases. *Courtwright v. B. R. & A. W. M. Co.* 30 Cal. 573; *Yolo Co. v. Sacramento*, 36 Cal. 195.

It is insisted by appellant that this is a suit in equity; and so it is, unless, by the present constitution, the superior court has had conferred upon it jurisdiction of such actions *as actions at law*, or of their own kind. Section 5 of article 6 of the constitution defines the jurisdiction of the superior courts. The section confers upon the superior court jurisdiction "in all cases in equity," and then, separately, jurisdictions "of actions to *prevent or abate* a nuisance." This last-mentioned clause can be given independent effect only by supposing an intent to confer the power to determine such actions as a tribunal special, and not equitable, with reference to them. Section 731 of the Code of Civil Procedure, after declaring what things shall constitute nuisances, provides that a nuisance "is the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered." This section of a Code which treats of *procedure*, would not of itself authorize any other action than an equitable one; but, inasmuch as the constitution gives *an action*, (other than and independently of a bill in equity,) the cases which have held that, in any equity suit, a jury may be refused the parties, and that the verdict is *advisory* only, have no application to such an action. By the Code either party is entitled to jury trial, unless a jury has been waived; the right being limited only by the provision of the constitution which confers "equity" jurisdiction on

the superior court. And in every case, when the right of trial by jury exists, the verdict may be general. When, therefore, an action to abate a nuisance and for damages is tried by jury, the general verdict for damages includes a finding in favor of plaintiff upon all the issues, and the judgment, besides adjudging damages in the amount found by the jury, may order an abatement of the alleged nuisance. It follows, the case at bar did not demand special "findings" by the court upon all the issues made by the pleadings.

2. There was evidence tending to prove that the "Davis" road was sometimes called the "Lower Sacramento" road. Besides, the complaint was amended by substituting "Davis" for "Lower Sacramento."

3. There is no evidence that the board of supervisors directed the *fill* to be removed. The supervisors could not authorize the roadmaster to do an unlawful act; and their direction to do a lawful act, which operated an injury, would constitute no defense unless it at least affirmatively appeared that the work could not be done equally well in such manner as would not produce the injurious results. There is evidence that the removal of the fill was not absolutely necessary to render the road passable, and that defendants did not have the work in the road, in the discharge of a public duty, skillfully, and carefully performed. It follows that neither the county of San Joaquin nor its supervisors were necessary parties.

4. We cannot say the evidence conclusively proved that the canal itself, or a portion of it, or the *fill*, constituted a nuisance which any citizen might lawfully abate.

5. No objection was taken by demurrer to the complaint, or by answer, that two separate nuisances were charged; that two causes of action were improperly united; or that defendants Castle and Williams were improperly joined with defendant Christian. The objections were therefore waived. Code Civil Proc. 434. But the complaint charges that in addition to removing the embankment or *fill* in the road, all of defendants "also filled up and obstructed the natural sloughs connected with the canal on the south side thereof," etc. The evidence tended to prove unity of design in the acts which resulted in turning the waters upon plaintiff's land.

6. The evidence does not prove that the county ever adopted the acts of defendants, or continued in the road the results of such acts. The road was dedicated to the public use; but if the acts of defendants upon the road constituted or produced a nuisance, of which the adjoining land-owners could complain, the county was not responsible for injuries suffered by the latter, merely because it did not cause the road to be restored to its former condition. Certainly the defendants cannot transfer responsibility to the county. If they were wrongdoers in removing the *fill*, (they not then having exclusive possession of the road,) they must be presumed to have it in their power to abate the nuisance which they created. The facts do not bring the case within the rule laid down in *Blunt v. Aikin*, 15 Wend. 521.

7. Actual possession of land is evidence, *prima facie*, of ownership; and one in possession may maintain an action upon a nuisance which injuriously affects his enjoyment of the possession. Civil Code, §§ 1006, 3479; Code Civil Proc. 731; *Stone v. Bumpus*, 40 Cal. 428; *Wood*, Nuis. 818.

8. As to the ruling of the court sustaining the objection to the question asked the witness Castle, whether he had anything to do with maintaining embankments, etc., it could not have injured that defendant. The witness had already testified, "I had nothing to do with the building of the canal or of the embankments;" and there was no evidence tending to prove that he aided in *maintaining* the embankments (in the canal, or stopping the sloughs) after they were built.

9. The defendants were not injured by the instruction:

"If the jury believe from the evidence that the defendants, without right, and against the will of plaintiffs, removed an embankment which had been erected across the canal, as set forth in the complaint, and that, by reason of such removal, the waters flowing in said canal from Stone's slough were caused to flow onto the lands of plaintiffs, to their injury, then the jury should find for plaintiffs such sum as will fully compensate them for all loss sustained by the act of defendants in removing said embankment, not exceeding the sum claimed in the complaint, to-wit, \$6,000."

Of course, plaintiffs were not entitled to recover any damages for injuries caused by the removal of the fill or embankment in the canal, unless the removal produced a nuisance. But the question, *nuisance* or *no nuisance*, was submitted to the jury. By section 625, Code Civil Proc., the court is authorized in all cases to instruct the jury, if they render a general verdict, to find upon particular questions of fact. In the case before us such instruction was given, and the jury, in addition to their general verdict, found specially that the removal of the embankment (in the canal at the Davis road) was a nuisance, and also that the obstruction of the natural slough "on the south side of the canal, and immediately above the said place of embankment," was a nuisance. If the jury had found that the removal of the *fill* or embankment in the canal was *not* a nuisance, not only would the charge to the jury above quoted have been erroneous in itself, but the general verdict would have been of no avail. But as the jury found it was a nuisance, it was their duty to find damages for injuries caused by it, and the instruction did not prejudice defendants.

10. Instruction E was properly refused. No statute required the removal of the fill.

Judgment and order affirmed.

65 Cal. 340

ARATA and others v. TELLURIUM GOLD & SILVER MINING Co. and others. (No. 9,266.)

Filed June 17, 1884.

The same person may be both the owner and reputed owner of property, and, in a claim of lien for labor, a statement that the name is the name of the owner, is none the less positive because it is also declared to be the name of the reputed owner.

The verification attached to a claim of lien is sufficient if it states that the same "is true;" the omission to state "of his own knowledge" is not a defect.

Under a rule of court which required notice of every motion not *ex parte*, defendants should be allowed an opportunity to prepare to meet a motion to strike out an answer as sham or irrelevant.

Where the prayer is for the benefit of the mechanic's lien law, a judgment in the form prayed for cannot be entered by default.

Where an answer is stricken out, and default entered, defendants stand in the same position as if they had failed to answer, and plaintiff is entitled only to the relief prayed for.

Department 1. Appeal from the superior court of Amador county.
Action to foreclose lien for labor on a mine.

Eagan & Armstrong, for appellants.

D. B. Spagnoli, for respondents.

By THE COURT. 1. Appellants make the point that the court erred in overruling the demurrer of defendants to the separate complaint of E. A. Ketchum. Our attention has not been called specially to any defects in the complaint. We can discover no insufficiencies in it such as rendered it subject to general demurrer.

2. It is said the court below erred in admitting the "claims of lien" of plaintiffs. The statute (Code Civil Proc. § 1187) requires a claim to contain a "statement of his demand, * * * with the name of the owner, or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials," etc. The "claims" objected to state "that the Tellurium Gold & Silver Mining Company, a corporation duly organized and existing under the laws of the state of California, is the name of the owner and reputed owner of said premises." Also, "that Isaac Lipman is the name of the agent and superintendent of said mining company, who, on or about the tenth day of November, 1882, as such agent and superintendent, entered into a contract with said E. A. Ketchum," etc. The *claims* complied with the requirements of the law. The same person may be both the owner and reputed owner, and a statement that a name is the name of the owner is none the less positive because it is also declared to be the name of the reputed owner.

3. The appellants contend that the verification to the "claims" is insufficient. Section 1187, Code Civil Proc., provides that a claim must be verified by oath of the claimant or some other person. It does not require that the verification shall be in form like that attached to a pleading; indeed, such form would probably not comply

with the requirement of the section. The affidavit attached to each claim is that the same "is true." The omission to state "of his own knowledge" is not a defect.

4. At the calling of the term calendar on the eighth day of June, 1883, this cause was set down for trial on the thirteenth day of July, 1883. But, on the day first mentioned, counsel for plaintiff Ketchum moved the court, without written notice to defendants, "that the default of the defendants be entered for want of an answer, and that plaintiff take judgment as prayed in the complaint, in the action of Ketchum against the defendants." Counsel for defendants appeared, and objected specially to the hearing of the motion, upon the ground that no written notice of such motion, or grounds for the same, had been given or served. A rule of the court required notice of every motion not *ex parte*. The court overruled the objection, and *granted the motion*. The Codes do not specify the motions which may be heard only on notice, but leave the courts to determine whether each motion requires or does not require notice. It would seem eminently proper that a defendant should have an opportunity to prepare to meet a motion to strike out an answer as *sham*—false, in fact—or irrelevant. Code Civil Proc. 453. We think the court erred in overruling the objection to the want of notice; and the action of the court may have prejudiced defendants' rights. If, at the trial, plaintiff had asked for judgment on the pleadings, defendants might have prayed for leave to amend. The order of the court seems to have been based upon the fact that in their answer defendants denied, "upon information and belief," certain averments with respect to which they must be supposed to have actual knowledge. No evidence was taken to prove that the denials were *false*, (*sham*,) and they certainly were not irrelevant. Yet it is only "sham and irrelevant answers" which may be stricken out on motion.

Again: The court struck out the answer, ordered *default* to be entered, and thereupon ordered that "plaintiff take judgment as prayed for in the complaint." The judgment prayed for is: "Wherefore, said claimant, Edward A. Ketchum, claims the benefit of the law to liens of mechanics and others upon real property, to-wit, chapter 2, tit. 4, pt. 3, of the Code of Civil Procedure." It is quite evident that a judgment in the form prayed for cannot be entered by default. When the answer was stricken out and default entered, defendants stood in the same position as if they had failed to answer. There is no prayer in the complaint for other and further and general relief, upon which a court of equity could base an appropriate decree.

Judgment reversed, and cause remanded for a new trial.

65 Cal. 336

FLEMING v. WELLS. (No. 8,306.)

Filed June 17, 1884.

Where defendant verifies his answer, the Code does not require that he shall state in the affidavit that "he has heard the answers read and knows the contents thereof." The statement, "the matters set forth in the foregoing answer are true," is the equivalent of the statement that "the foregoing answer is true." The defendant is required to state that the answer "is true except as to matters therein stated to be on information and belief, and, as to those matters, he believes it to be true." The matters stated on information or belief are thus put in opposition to the rest of the answer; that is, to the matters stated positively.

When judgment is rendered for plaintiff on the pleadings, the averments of the answer will be treated as true on appeal.

A sheriff who rightfully took property from a person under process, in an action of replevin, and delivered it to the plaintiff in that action, simply discharged his duty, and cannot, therefore, be held liable for the property, or its value and damages, at the suit of the defendant in that action. His recourse is to the plaintiff therein.

In an action of replevin, where the property, the subject of the action, has been delivered to plaintiff, a judgment of nonsuit does not entitle defendant to a return of the property. To obtain such relief, defendant must obtain a judgment therefor; and, where defendant complains that the judgment did not provide for a return, his remedy is in that action in the superior court, or by appeal, and not in an independent action.

Department 1. Appeal from the superior court of Tulare county.
Atwell & Bradley, for appellant.

Edwards & Du Brutz, for respondent.

BY THE COURT. This appeal is from a judgment on the pleadings for a delivery to plaintiff of the property mentioned in the complaint, or, in case delivery cannot be had, for \$2,350 dollars, its value, for \$550 damages for the detention, and costs, etc. It is urged by respondent that the judgment should be affirmed, because the verification of the answer is not such as is required by section 446 of the Code of Civil Procedure. But the record shows that when the answer was filed, there was attached thereto a verification in words and figures following:

"*County of Tulare—ss.:* M. J. Wells, being duly sworn, on oath says that he is the defendant in this cause; that the matters set forth in the foregoing answer are true, except as to those matters therein stated on information or belief, and, as to those matters, that he believes them to be true.

"M. J. WELLS.

"Subscribed and sworn to before me, this twenty-eighth day of January, 1882.
N. O. BRADLEY, Notary Public. [Seal.]"

The Code does not require, when the answer is verified by the defendant, he shall state in the affidavit that "he has heard the foregoing answer read, and knows the contents thereof." The statement, "the matters set forth in the foregoing answer are true," is the equivalent of a statement, "the foregoing answer is true." Section 446 requires him to state that "the same" (the answer) "is true, except as to the matters which are therein stated on his information or belief, and, as

to those matters, he believes it to be true." The matters stated on information or belief are thus put in opposition to the rest of the answer; that is, to the matters stated positively. We think the verification sufficient.

The answer avers facts, fully and at large set forth, from which it appears that prior to the commencement of the present action one Hawley commenced an action against the plaintiff herein, and one Fowler, to recover the identical property described in the complaint herein; that in that action, upon proper affidavit, undertaking, and order of the attorney for plaintiff therein, (which were forthwith served on the defendants therein,) the present defendant, as sheriff, took said property from the defendants on the twelfth day of November, 1881; that on the seventeenth day of the same November, (the day after the present action was commenced,) the plaintiff herein made affidavit for claim and delivery, and executed bond, which affidavit and bond (together with an order of the attorneys for plaintiff herein) were delivered to an elisor appointed by the court, by whom the property was taken from the defendant herein, sheriff as aforesaid; that afterwards, on the twenty-second of November, 1881, defendant gave the undertaking provided for in such case by the Code, and demanded a return of the property of the elisor, who, on the same day, delivered the property to the present defendant; that defendant, sheriff, thereupon *delivered the property to Hawley*, the plaintiff in the action wherein plaintiff and Fowler were defendants; that afterwards, on the twelfth day of December, 1881, the plaintiff herein filed an answer in the action, wherein he and said Fowler were defendants, in which he demanded a return of the property therein and herein sued for; that the action, *Hawley v. Fowler and Fleming*, came on to be tried on the twenty-first day of January, 1882, and, at the conclusion of the evidence on the part of the plaintiff therein, the court, on motion of defendants, ordered a judgment of nonsuit in that action, on the ground that plaintiff had not made out a case sufficient to go to a jury, and thereupon a judgment was entered in favor of defendants therein for their costs. The court below held that the facts set forth in the answer constituted no defense to the present action.

For the purposes of the judgment on the pleadings the averments of the answer must be treated as true. Certainly the defendant here did not *take* the property from the plaintiff *wrongfully*, but, as sheriff, under process which made it his duty to take it. Before the expiration of five days, at the expiration of which it would have become the duty of the sheriff (defendant herein) to deliver the property to Hawley, the present action was commenced, and the property taken by the elisor. When the property was returned to the sheriff, on his giving bond, etc., he did what it was his plain duty to do, delivered it to Hawley. The present plaintiff did not give the bond provided for in section 514 of the Code of Civil Procedure, which alone would have authorized him to demand a return of the property taken by the

sheriff, but, instead of executing and tendering the bond, commenced this independent action against the officer. As we have said, no right of action for a recovery of the property from the sheriff existed in favor of the plaintiff when the present suit was begun; nor was the sheriff permanently relieved of the duty of delivering the property to Hawley by the circumstance that it was taken out of his possession by the elisor. As soon as it was returned to him, the duty attached of delivering it to Hawley, plaintiff in the action, at whose instance it had been taken by the sheriff. This duty he performed. Even if the judgment of nonsuit could be construed to be a judgment that defendants were entitled to a return of the property by Hawley, the judgment in the present suit could not be upheld. Prior to the rendition of the judgment of nonsuit, the present defendant, in strict accordance with his duty as sheriff, had delivered the property to Hawley, and the judgment (construed as a judgment for a return) required *Hawley*, and not the present defendant, to return the property, or pay its value in case return could not be had. As the sheriff rightfully took the property from the present plaintiff, and simply discharged his duty in delivering it to Hawley, he cannot be held liable for the property, or its value and damages, at the suit of the present plaintiff.

It may be added that, in the action brought by Hawley, the defendants did not recover a judgment for a return of the property by the plaintiff therein, or its value. The defendants in that action asked for a nonsuit and got what they asked for. If, under the circumstances, they could complain of the judgment because it did not provide for a return, etc., the remedy was to be sought in that action in the superior court, or by appeal. Even if it could be held that a judgment might properly be entered against the present defendant if he came wrongfully into possession of the property *after* the action was brought, although his possession when the action was commenced was rightful, the facts do not show such subsequent wrongful possession. Moreover, if it could be held that in case a judgment for a return of the property to defendants by Hawley had been entered in the action brought by him, it would have become the duty of the sheriff to take the property from Hawley and deliver it to defendants therein, (and that it was a duty which he could be compelled to perform in this *independent action*,) no judgment was in fact entered in the action brought by Hawley for a return of the property to the defendants in that action.

Judgment reversed.

SWIFT *v.* SHEPARD. (No. 8,914.)

Filed June 26, 1884.

On authority of opinion in department, (11 Pac. C. L. J. 560,) judgment affirmed.

Appeal from the superior court of Santa Barbara county. The opinion in department, in this cause, is reported in 11 Pac. C. L. J. 560.

Paul R. Wright and *R. B. Canfield*, for appellant.

W. C. Stratton, for respondent.

BY THE COURT. For the reasons given in the department opinion in this case, (11 Pac. C. L. J. 560,) judgment and order affirmed.

65 Cal. 351

GRAVES *v.* SUPERIOR COURT SAN BERNARDINO CO. (No. 9,501.)

Filed June 26, 1884.

On authority of *McConky v. Superior Court*, 56 Cal. 83, application for writ of *certiorari* denied.

Department 1. Application for writ of *certiorari*. The facts in this case were substantially the same as those set forth in *McConky v. Superior Court*, 56 Cal. 83.

Geo. H. Maxwell, for petitioner.

BY THE COURT. Upon the authority of *McConky v. Superior Court Alameda Co.* 56 Cal. 83, the application for a writ of *certiorari* is denied.

65 Cal. 351

EMERY *v.* REED. (No. 8,776.)

Filed June 27, 1884.

On the authority of *Snyder v. Johnson*, (No. 6,016,) the "Act to authorize the city of Oakland to construct a main sewer," approved March 23, 1874, is declared constitutional.

With respect to laws passed under the late constitution, the construction put upon them by the highest court in existence under such constitution will be accepted, without regard to the views of the present court in respect to the correctness or incorrectness of that construction.

In bank. Appeal from the superior court of Alameda county.

A. A. Moore, *P. J. Van Loben Sels*, and *A. C. Adams*, for appellant.

J. C. Martin, Cope & Boyd, J. M. Taylor, and Lloyd Baldwin, for respondent.

By THE COURT. The constitutionality of the act entitled "An act to authorize the City of Oakland to construct a main sewer," approved March 23, 1874, (St. 1873-74, p. 530,) was directly attacked in the case entitled *Snyder v. Johnson*, (No. 6,016,) and in that case this court, in the year 1878, held the act valid. We have frequently said that, with respect to laws passed under the late constitution, the construction put upon them by the highest court in existence under it, would be accepted by us without regard to our own views in respect to the correctness or incorrectness of that construction.

Judgment and order affirmed.

SHARPSTEIN, J. Without expressing any opinion on the question discussed in the leading opinion, I concur in the affirmance of the judgment on the ground that appellant has not been deprived of a hearing upon any question on which the legislature could have given him a hearing. Under the act which authorized his assessment to be made, it was the duty of the city council each year to ascertain the amount required to pay the interest on the sewer bonds, and of the assessor to assess the lands liable therefor *equally*, according to area, for such amount. If the assessor failed to assess said lands *equally, according to area*, the inevitable result would be a void assessment, under which the owner of any land so erroneously assessed could not be deprived of his property. In case of assessments for general municipal purposes, it is only on the question of *valuation* that a tax-payer of said city can have a hearing before the assessment on his property becomes final. Here no such question arises or can arise. The only questions which could possibly arise in this case are questions upon which a tax-payer, under the charter of said city, could have no hearing before the board of equalization. If this assessment was not made as the law required it should be, it was void. In case of overvaluation an aggrieved party would be concluded by not appearing before the board of equalization, or by the determination of that board if he did appear before it. It was important, therefore, that he should have such notice as would enable him to appear if he desired to. In that case he might be prejudiced if no notice was given. In this case he could not be prejudiced by the omission to give notice. The assessment, if made in the manner prescribed by the statute, would be valid; otherwise, void. And the appellant was not, and could not be, deprived of the right to show that it was not made according to law, whether he had notice or not. He was entitled in this action to attack the validity of the assessment on any ground upon which he could have contested its validity if the law had provided, as counsel contended it should, some board or tribunal before which he might appear and contest its validity. He is not deprived of "his day in court." If the assessment is not valid it can-

not be enforced. He has had an opportunity to contest its validity, and that is the only question he could have ever contested. I know of no constitutional provision to which this statute is repugnant.

65 Cal. 345

BAYLY *v.* MUEHE. (No. 8,165.)

Filed June 27, 1884.

On authority of the opinion rendered in department, (11 Pac. C. L. J. 408,) judgment reversed, and cause remanded.

In bank. Appeal from the superior court of the city and county of San Francisco.

F. J. Castlehun and Stanley, Stoney & Hayes, for appellant.

Stetson & Houghton and A. & H. C. Campbell, for respondent.

By THE COURT. For the reasons given in the opinion delivered when this case was before department 1 of this court, (11 Pac. C. L. J. 408,) the judgment is reversed and cause remanded.

2 Cal. Unrep. 331

THATCHER *v.* EDSALL. (No. 7,792.)

Filed June 28, 1884.

Where, in an action of foreclosure of mortgage, a cross-complaint is filed, charging plaintiff and others with fraud and conspiracy regarding the execution of such mortgage, and the lower court finds against the defendant as to such fraud, plaintiff is entitled to his judgment of foreclosure, however fraudulent the conduct of the other parties (joined in such cross-complaint) may be.

Findings *held* supported by the evidence.

Department 1. Appeal from the superior court of Mendocino county.

Porter & Rutledge, for appellant.

T. L. Carothers and T. B. Bond, for respondent.

Ross, J. To a verified complaint, in the ordinary form, for the foreclosure of two certain mortgages, the defendant, Juana B. Edsall, interposed an answer, in which she admitted the execution of the notes and mortgages set forth in the complaint, but denied that at the time of such execution she was indebted to the plaintiff in any sum of money, and alleged that she executed the notes and mortgages without receiving any consideration whatever therefor, and that each

of those instruments was procured from her by false and fraudulent representations. For a further and separate answer she alleged that she did not know, at the time of her execution of the note and mortgage set forth in the first count of the complaint, that the amount thereby agreed to be paid by her was \$4,700, but believed that the sum therein mentioned and agreed to be paid was \$4,500, and no more, and that the sum of \$4,700 was inserted in said note and mortgage without her knowledge or consent. Like averments are made in the answer of defendant with respect to the note and mortgage secondly counted on by the plaintiff; that is to say, it is alleged that defendant did not know at the time of the execution of that note and mortgage, or for a long time afterwards, that the sum therein mentioned and agreed to be paid by her was \$5,300, but that she believed the sum to be \$4,500, and no more, and that the sum of \$5,300 was inserted in said note and mortgage without her knowledge or consent. In addition to her answer, the defendant filed, with the permission of the court below, a cross-complaint, in which she made the plaintiff Thatcher, and one Knox and one Harrison, parties defendant, and therein charged that Thatcher, Knox, and Harrison entered into a conspiracy to cheat and defraud her of all her property, including that described in Thatcher's mortgages, and that those mortgages were procured from her by the alleged conspirators by means of false and fraudulent representations, made in furtherance of the conspiracy, to the end that they might obtain from her, among other property, the land embraced in the mortgages.

It is entirely clear that but for the averments implicating Thatcher in the alleged conspiracy, the cross-complaint would have had no place in the action, which, as has been stated, was simply one for the foreclosure of the mortgages executed to Thatcher. And when the court below, after trial, found, as it did, the facts to be that the defendant executed the notes and mortgages in question in consideration of the amount of money named in them being loaned to her by the plaintiff at the time of their execution, and that she executed the instruments with full knowledge of their contents, and without any false or fraudulent representations, and that Thatcher never did conspire with Knox and Harrison, or either of them, or with any one else, or at all, to cheat or defraud the defendant, it would seem to follow that Thatcher is entitled to the decree awarded him by the court below, foreclosing the mortgages set out in his complaint, unless, indeed, we can hold as unsupported by the evidence the findings of fact made by the trial court. This, after an attentive reading of the evidence, we are unable to do, under the established rule governing this court in such matters. However fraudulent towards defendant the conduct of Knox and Harrison, if, as the court below found, Thatcher had no part with them, and was himself guiltless of any false and fraudulent representations, but loaned defendant the money for which she executed the notes and mortgages, we see no reason

why he is not entitled to a decree of foreclosure, the event having occurred conferring upon him the right to foreclosure.

Judgment and order affirmed.

McKINSTRY, J. I concur.

McKEE, J. I concur in the judgment.

65 Cal. 353

O'DONNEL *v.* KRAMER. (No. 7,805.)

Filed June 28, 1884.

In an action to enforce laborers' liens, no greater amount is recoverable than the sum due to the contractor.

Department 2. Appeal from the superior court of Solano county.

L. B. Mizner and George A. Lamont, for appellant.

Joseph McKenna, for respondent.

By THE COURT. Action to enforce laborers' liens. The complaint did not aver that any money was due the contractor; but the answer presented that issue, and the court found thereon. We therefore think the case is within section 580, Code Civil Proc. The court found that the amount due the contractor, when he abandoned the contract, was \$190; but gave judgment for plaintiffs for the full amount due them. This was error; the judgment should have been for the \$190. *Latson v. Nelson*, 11 Pac. C. L. J. 589.

The cause is remanded, with instructions to modify the judgment by reducing the amount for which a sale should be made to \$190, with interest, costs, and attorney's fee, to be properly apportioned among the plaintiffs.

65 Cal. 357

DASCEY and others *v.* HARRIS. (No. 7,585.)

Filed June 28, 1884.

Wheat growing on homestead property, but not ripened, has not such an existence that it will pass to the assignee in insolvency of the husband: such wheat is part of the homestead, to the extent that a conveyance of the homestead would pass the growing crop.

Department 2. Appeal from the superior court of Santa Clara county.

Moore, Laine & Johnston, for appellant.

Houghton & Reynolds and J. S. Willis, for respondent.

MYRICK, J. Replevin. The wheat which is the subject of this action was grown on the homestead of plaintiffs. On the fifteenth of March, 1879, the plaintiff John Dascey filed his petition in insolvency, and such proceedings were had that on the twenty-ninth of April, 1879, he made an assignment of all his property, real and personal, to the defendant, assignee in insolvency. No property was specifically described in the assignment, but words of general description only were used. At the time of filing the petition, the premises constituting the homestead had been sown with wheat, which was then growing, and continued to be growing until after the assignment. Sometime in August, 1879, after the wheat so raised on the premises had ripened, and been harvested, threshed, and sacked by said John Dascey, the defendant, as assignee, under an order of the county court, seized the grain on the premises, and caused it to be removed therefrom. The wheat, when so taken, was of the value of \$1,267. It does not appear that evidence was given of any damage to plaintiffs besides the value of the wheat. At the time of the assignment the wheat in controversy had not such an existence as that it passed to the assignee. At that time the growing wheat was a part of the homestead; at least, to the extent that a conveyance of the homestead would have passed the growing crop.

Judgment reversed and caused remanded, with instructions to render judgment on the findings in favor of plaintiffs for the possession of the property sued for; or, in case a delivery cannot be had, for \$1,267, with interest thereon from the date of the seizure by defendant, and for costs.

We concur: SHARPSTEIN, J.; THORNTON, J.

65 Cal. 361

DASCEY and others v. HARRIS. (No. 7,891.)

Filed June 28, 1884.

The sale, in insolvency proceedings, of property which has been declared a homestead, is not authorized by the law of this state.

The insolvent act of 1852 did not in terms, nor by any inference, declare that the neglect or refusal of the judge of the insolvency court to set apart property, should be a conclusive adjudication that it was not a homestead under the homestead act, or should be equivalent to an abandonment.

Department 2. Appeal from the superior court of Santa Clara county.

Houghton & Reynolds and *Jos. S. Wallis*, for appellant.

Moore, Laine & Leib and *F. M. Crossett*, for respondent.

MYRICK, J. The complaint in this action was filed by John Dascey and wife to restrain the defendant, assignee of John Dascey, from

selling the homestead of plaintiffs. The court below found the facts going to show occupation and dedication of the premises as a homestead before the insolvency proceedings, and that the value was less than \$5,000. The defendant John Dasey filed his petition in insolvency, and in his schedule the premises were properly described and alleged to be a homestead. The answer presented the defense that the insolvent petitioned the county court to set apart the premises as a homestead, and that said court, after hearing the proofs of the respective parties, did adjudge that the premises were not impressed with the character of a homestead, but that they were assets subject to the payment of debts, and directed the defendant, as assignee, to sell the same and apply the proceeds to the payment of the insolvent's debts, and that by this finding and adjudication the plaintiffs are estopped from claiming the premises as a homestead.

This court said, in *Barrett v. Simms*, 62 Cal. 440: "There is no statute of this state authorizing a sale, in insolvency proceedings, of property which has been declared a homestead." The homestead act of 1852 (under which the declaration of homestead in this case was made) declared that the premises selected "shall not be subject to forced sale on execution, or any final process from any court for any debt or liability contracted or incurred after the passage of the act to which this is amendatory." Section 6 of the insolvent act of 1852 made it the duty of the judge of the insolvency court to set apart property not subject to execution. The insolvent act did not in terms, nor by any inference, declare that the neglect or refusal of the judge of the insolvency court to set apart property should be a conclusive adjudication that it was not a homestead under the homestead act, or should be equivalent to an abandonment.

Judgment affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

65 Cal. 360

WALKER v. McCUSKER. (No. 8,140.)

Filed June 28, 1884

The liability of a tenant in possession to the purchaser of real estate under a decree of foreclosure, for the rents or use and occupation from the day of sale to the expiration of the time for redemption, is a statutory liability merely, and exists without the assent of the person in possession. It is not a liability founded on a contract, express or implied, within the meaning of section 537, Code Civil Proc., authorizing the issuance of an attachment.

Department 2. Appeal from the superior court of Monterey county.
N. A. Dorn, Wm. R. Parker, and T. H. Laine, for appellant.
A. S. Kittredge, for respondent.

BY THE COURT. This action was brought to recover of the defendant, as tenant in possession of real estate purchased by plaintiff on decree of foreclosure and sale, the sum of \$1,200, value of the use and occupation from the day of sale to the making of the deed. The plaintiff sued out a writ of attachment, by which property was attached. The defendant moved that the attachment be dissolved. The court below denied the motion, and the appeal from the order of denial is before us.

Section 707, Code Civil Proc., declares that the purchaser, from the time of sale, is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation.

The liability of the tenant in possession to the purchaser for rents, or use and occupation, from the day of sale to the expiration of the time for redemption, is a statutory liability merely, and exists without the assent of the person in possession. It is not a liability founded on a contract, express or implied, within the meaning of section 537, Code Civil Proc., authorizing the issuance of an attachment.

The order is reversed and the cause is remanded, with instructions to dissolve the attachment.

65 Cal. 358

CITY OF SAN JOSE v. WELCH and others. (No. 7,723.)

Filed June 28, 1884.

The sureties on a city assessor's bond, where the bond is limited to the effect that the principal will perform the duties of the office according to laws, ordinances, and regulations "passed and approved by the mayor and common council" of the city, are not responsible for moneys collected by such assessor as taxes upon personal property not secured on real estate, which he failed to pay over to the treasury, in the absence of a law, ordinance, or regulation of such mayor and council, authorizing such assessor to make such collections.

Department 2. Appeal from the superior court of Santa Clara county.

D. M. Delmas, W. H. McGrew, W. M. Lovell, and J. F. Malone, for appellants.

D. W. Harrington, for respondents.

BY THE COURT. This is an action on the bond of one Castle, given as city assessor and city clerk. The condition of the bond is that Castle "shall well and truly and faithfully perform the duties of city assessor and city clerk, according to the laws and ordinances and regulations passed and approved by the mayor and common council of the city of San Jose." Castle made an assessment of property, and collected from divers persons assessed on the assessment roll for personal property divers sums as taxes which were not secured on real estate, and failed to pay over to the treasurer the sum of \$1,893.20

so collected; and this action was brought to recover that amount of his sureties.

No law, ordinance, or regulation was passed and approved by the mayor and common council authorizing the assessor and clerk to collect any taxes. On the contrary, the ordinance passed by the mayor and common council directed the clerk to make out an assessment roll and deliver a copy thereof to the collector, and authorized the collector to make collections of all taxes, as well those not secured on real estate as those secured.

The bond given to Castle being to perform the duties of the office according to the laws, ordinances, and regulations passed and approved by the mayor and common council, and no law, ordinance, or regulation having been passed by the mayor and common council authorizing him to make collections, the sureties on his bond are not liable for his omission to pay over.

It is claimed on behalf of the city that under section 3820, Pol. Code, it was the duty of the assessor to collect taxes on personal property not a lien on real property, upon the ground that by the charter of the city of San Jose, § 13, (St. 1873-74, p. 401,) the common council, in providing for the levying and collecting of all city taxes, was to be governed by the state laws, and could not take from the assessor the duty of collecting unsecured personal property taxes; and it being by law (section 3820, *supra*) the duty of the assessor to make the collections in question, his sureties are liable. It is sufficient to say, in that regard, that the bond is limited in terms to duties cast upon the principal by the mayor and common council, and the liability of the sureties cannot be extended.

Judgment and order reversed, and cause remanded, with directions to render judgment for defendants.

SUPREME COURT OF CALIFORNIA.

(65 Cal. 354)

BEARD v. BEARD. (No. 7,781.)

Filed June 28, 1884.

DIVORCE—CONVEYANCE TO WIFE TO PREVENT DEFENSE—PUBLIC POLICY.

A contract whereby a husband agrees to transfer certain real and personal property to his wife, in consideration of her executing to him notes and a mortgage to secure the same, and abandoning her defense in an action of divorce then pending between them, and doing nothing to resist or prevent or delay him in obtaining a decree of divorce, is void as against public policy; the entire transaction is tainted with fraud, and the plaintiff is not entitled to recover.

Department 2. Appeal from the superior court of Monterey county.

W. H. Webb, Jas. A. Webb, and W. M. Park, for appellant.

N. A. Dorn, for respondent.

SHARPSTEIN, J. It appears by the findings that the plaintiff herein transferred real and personal property to the defendant, in consideration of her executing to him four notes, and securing the payment of the same by a mortgage, and abandoning her defense in an action of divorce then pending between them, and doing nothing to resist or prevent or delay him in obtaining a decree of divorce therein. He seeks in this action to recover the amount so secured. The defense is that the notes and mortgage are so tainted by fraud that a court ought not to enforce them. The agreement between the parties in the divorce proceeding was clearly collusive—"a secret agreement and co-operation for a fraudulent purpose." The decree obtained in pursuance of it was obtained through fraud on the court. If the court had been advised of that agreement it would not have granted the divorce.

In *Barnes v. Barnes*, L. R. 1 Prob. & Div. 505, a decree *nisi* had been rendered, when it was made to appear to the court that the petitioner had, in substance, said to his wife, the respondent: "If you don't oppose, I shall get a divorce cheaper than if you do; therefore, keep quiet, and I will give you some money when the decree is obtained, and I will do no harm to the co-respondent." The decree was rescinded and the petition dismissed; **CRESSWELL, J.**, remarking: "If that is not collusion, I do not know what is." It would not be "collusion" within the definition of that term in our Code, (Civil Code, § 114,) but it would be none the less a fraud on the court, and in contravention of the policy of the law. The law-making power, for reasons which it is unnecessary here to state, has made a distinction between divorce and other cases, by declaring that "no divorce can be granted upon the default of the defendant," etc. *Id.* § 130. Our

reason for referring to this provision is not because we have any ground for doubting that the court complied fully and strictly with the law, but because the intention of the legislature to prevent the obtaining of divorces in the way plaintiff obtained his, is clearly manifested. If a divorce could not be granted upon the default of the defendant, or upon the uncorroborated statement, admission, or testimony of the parties, could it be granted in a case in which the defendant, for a consideration, had stipulated not to make any opposition to the granting of it? Clearly not. And the objection is not obviated by the suggestion that for anything which appears the defendant may have had no defense to the action in which the divorce was obtained. It appears that she filed an answer denying the allegations which constituted any ground for a divorce, and that she abandoned her defense. Whether a divorce would have been granted if she had not, is quite immaterial. If it had been granted upon her default or admissions, or the uncorroborated testimony of the parties, or either of them, the question whether the application for a divorce might have been successfully resisted would not have been considered.

We shall confine our investigation to what was done, and will not inquire what might have been the result of a fair trial of the issues. If, on a *bona fide* trial, the plaintiff could have established the allegations of his complaint, there was no occasion for his procuring an abandonment of the defense. Do the facts bring this case within the rule that "a right of action cannot arise out of fraud?" "which applies, not only where the contract is expressly illegal, but whenever it is opposed to public policy, or founded on an immoral consideration." Broom, Leg. Max. 732. The object of the rule obviously is to discourage contracts of that kind, by refusing any legal assistance in enforcing them. In this case, the plaintiff has secured, by his fraud on the court, a part of the consideration of his transfer of property to the defendant, and he now asks the same court to aid him in obtaining the other part. And it is insisted on his behalf that this is a meritorious claim. It is doubtless true that if any part of a contract is valid, and the sound part can be separated from the unsound, it may be enforced *pro tanto*, provided the good and bad do not both form parts of one transaction. In this case the agreement of the defendant to abandon her defense in the divorce case, and to give the notes and mortgage, were parts of one and the same transaction, and constituted the consideration of the transfer of property by the plaintiff to her. And we are warranted in assuming that the transfer would not have been made if the defendant had not agreed to abandon her said defense, as well as to execute the notes and mortgage.

As we view it, this case is clearly within the reason of the maxim, "*Ex turpi causa non oritur actio*." The entire transaction between the parties is tainted by fraud, and the plaintiff must content himself with so much of the benefit of it as he has already secured unchal-

lenged. The reason why the common law says such contracts are void is for the public good; and we think that the public good requires that this transaction should be held to be void in all its parts. It was a contract which contemplated the perpetration of a fraud upon a court of justice; and we think it the duty of courts to discountenance and discourage such transactions to the utmost limit of their power.

Judgment and order appealed from reversed, with directions to the court below to enter judgment in favor of the defendant on the findings.

We concur: THORNTON, J.; MYRICK, J.

65 Cal. 374

DYER v. HUDSON. (No. 7,256.)

Filed June 28, 1884.

CITY AND COUNTY OF SAN FRANCISCO—STREETS—AUTHORITY OF BOARD OF SUPERVISORS.

The board of supervisors have power, under the street law of 1872, to authorize a contract to be made for macadamizing a street, after a contract for grading it has been entered into, and before it has been graded.

Evidence held sufficient to justify the findings.

In bank. Appeal from the superior court of the city and county of San Francisco.

This was an action for the recovery of the amount of a street assessment. Defendant, in answer to plaintiff's complaint, alleged that the assessment was invalid, as the board of supervisors had combined the work of grading and of macadamizing in one contract, and made a levy for the whole. The court found that the work was duly and properly done, and that the board of supervisors had acted within their powers as to such work. Defendant appealed.

D. H. Whittemore, for appellant.

J. M. Wood, for respondent.

SHARPSTEIN, J. It appears to us that the evidence is sufficient to justify the findings, and the only other question to be considered on this appeal is whether the board of supervisors could authorize a contract to be made for macadamizing a street after a contract for grading it had been entered into and before it had been graded. That grading must precede macadamizing is sufficiently clear, but the statute does not expressly provide that, until a street is graded, no contract shall be made for macadamizing it. Section 3 of the statute of 1872 (page 804) empowers the board of supervisors to order the whole or any portion of a street macadamized; and section 4 provides that said board may order such work to be done after notice of their inten-

tion so to do has been published as therein prescribed. After an order is made, it is the duty of the superintendent to advertise for sealed proposals, which must be submitted to the board, which has the power to accept the lowest. In *Emery v. San Francisco Gas Co.* 28 Cal. 375, it was held that the board had power to declare their intention to grade and macadamize a street in the same resolution. That being so, it is quite clear that both kinds of work may be ordered at the same time, and, if ordered, sealed proposals for doing both be advertised for at the same time, and contracts for doing both awarded at the same time.

The only jurisdiction which the board has is given by the statute, and if the statute be constitutional we cannot add any conditions precedent to those specified in the statute.

Judgment and order affirmed.

We concur: ROSS, J.; THORNTON, J.; MYRICK, J.

65 Cal. 363

BAKER v. RIORDAN. (No. 7,784.)

Filed June 28, 1884.

1. ESTATES OF DECEDENTS—EQUITY—SETTING ASIDE ORDER OF PROBATE COURT—FRAUD.

A court of equity has power to set aside and vacate an order of the probate court for distribution of an estate, on the ground of fraud.

2. SAME—PETITION FOR DISTRIBUTION OF ESTATE—NOTICE OF HEARING.

Where no notice is given, as required by law, of the hearing of a petition for distribution of an estate, the order of distribution will be vacated and set aside by a court of equity at the instance of a party injured thereby. The voluntary appearance of an unauthorized attorney does not affect plaintiff's right to relief prayed, or the power of a court of equity to grant it.

In bank. Appeal from the superior court of the city and county of San Francisco.

H. J. Tilden and *F. C. Coogan*, for appellant.

Richard Burke, for respondent.

SHARPSTEIN, J. The findings are to the effect that the defendant, who was administratrix of the estate of Eliza Baker, deceased, by false and fraudulent acts and proceedings, imposed so far upon the probate court as to procure therefrom a decree assigning to said defendant the share of said estate to which the plaintiff was entitled as the husband of said deceased; and that the notice which the judge of probate ordered to be given of the hearing of defendant's petition for distribution of said estate was not given as required by section 1634, Code Civil Proc., nor did the plaintiff have any notice thereof, or of any of the proceedings of said probate court, until after said decree had been made and entered therein. It is further found that an

attorney at law *assumed* to represent the plaintiff at said hearing, but that said attorney was never employed by the plaintiff for that or any purpose, and had no power or authority to represent the plaintiff therein, and that plaintiff had no knowledge of such appearance of said attorney until after said decree of distribution had been made. If upon these facts the plaintiff was entitled to any part of the relief prayed in his complaint, the judgment of the court below must be reversed.

Among other things, the plaintiff prays "for a decree * * * that said order of distribution be declared fraudulent and void, and be annulled, vacated, and set aside." The court found that it was fraudulent, but that a court of equity could give no relief.

In *People v. Lafarge*, 3 Cal. 130, a bill in equity was filed "*to set aside* a judgment," on the grounds "that there was no cause of action and no notice to the parties." The court said: "This remedy is well recognized in all courts having chancery jurisdiction, and the case made out by the complainants is one which fully entitles them to the interposition of the court."

"The equitable jurisdiction to cancel and set aside, or to restrain, judgments and decrees of any court, obtained by a fraud practiced upon the court and the losing party, is well settled and familiar." 2 Pom. Eq. Jur. 919. "When a judgment or decree of any court, whether inferior or superior, has been obtained by fraud, the fraud is regarded as perpetrated upon the court as well as upon the injured party." *Id.* We have no doubt of the right of the plaintiff under the findings to have the decree assigning his share of the estate of his wife to the defendant canceled and set aside; and, if he is entitled to have that done, his right to the other relief prayed cannot be doubted.

It is insisted, however, that he might have moved in the probate court, under section 473, Code Civil Proc., for any relief to which he may be entitled, and having failed to do so, or to give any sufficient reason for not doing so, equity will not take jurisdiction of the matter. This is not a case in which a judgment, order, or other proceeding has been taken against a party through "his mistake, inadvertence, surprise, or excusable neglect." There is no element of mistake, inadvertence, or excusable neglect in the case. The discovery that, in a proceeding of which he had no notice, a decree had been procured by fraud and perjury, which, if valid, transferred his share in his wife's estate to the defendant, would naturally surprise the plaintiff; but it was not the intention of the legislature to limit the time within which a party might obtain relief "from a judgment, order, or other proceeding taken against him," through his surprise, under such circumstances. The intention doubtless was, not to curtail, but to extend, the grounds of relief; not to limit the time within which a void judgment might be attacked and set aside to six months, but to give a party six months within which to move to have a valid

judgment set aside, on grounds other than those which affected its validity. Nor does the case fall within that other clause, which provides that "when, from any cause, the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant, or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action." Here there was no action, no summons, no defendant, and no personal service or answer required. The cases in which it has been held that the remedy by motion was exclusive, were those in which the law required the service of a summons on a defendant personally or by publication. It is quite clear that the legislature could impart no validity to a judgment obtained against a defendant in an action in which there had been no service of summons on, or voluntary appearance by, him. A judgment thus obtained would be void by reason of the absence of jurisdiction in the court to render it.

A person cannot be deprived of his property without due process of law. Certainly not by a proceeding of which he had no notice. The plaintiff in this case is entitled to relief beyond any which a court could give him under section 473, Code Civil Proc. He is entitled to have the judgment set aside and annulled absolutely, and to recover the rents received by the defendant for the use and occupation of the premises since said decree was made. The only relief which he could obtain by motion under the clause last cited would be the privilege "to answer to the merits of the original action." Obviously, that provision of the Code was not intended to apply to a case like this.

Under the circumstances, the fact of an attorney having voluntarily appeared in the proceeding for the plaintiff without being in any way authorized to appear for him, in no way affects the plaintiff's right to the relief prayed, or the power of a court of equity to grant it.

Judgment reversed, and the court below is directed to enter judgment in favor of the plaintiff for the relief prayed in his complaint.

We concur: MCKINSTRY, J.; MYRICK, J.; THORNTON, J.

65 Cal. 372

DYER v. HUDSON. (No. 7,226.)

filed June 28, 1884.

EVIDENCE—LOST PETITION FOR GRADING—CONTENTS, HOW PROVED—SHORT-HAND REPORTER'S NOTES.

A copy from the short-hand reporter's notes of a *certified* copy of a lost petition for grading is incompetent and inadmissible as evidence of the contents of the original petition. The original having been lost, the contents can only be proved by a copy of it, or by oral evidence, and any writing offered as a copy of the original must be proved to be such before it can be admitted in evidence.

In bank. Appeal from the superior court of the city and county of San Francisco. Suit to foreclose a street assessment lien.

J. M. Wood, for appellant.

D. H. Whittemore, for respondent.

SHARPSTEIN, J. It being admitted that the petition for grading had been filed in the office of the clerk of the board of supervisors, and had been lost, and could not be found, evidence of its contents was admissible; and the only question is whether the evidence admitted was competent. The court admitted in evidence, against the plaintiff's objection, a writing which the defendant testified had been copied by a short-hand reporter from his notes of the evidence taken in another case, in which a certified copy of said petition had been read in evidence. There is no evidence that the writing, admitted in evidence as a copy of the petition, had ever been compared with the original by the witness or any one else. If the original had been in the custody of a public officer, when evidence of its contents was sought to be given, the contents could only have been proved by the production of the original or a copy of it. But, having been lost, its contents could be proved by a copy or by oral evidence. Code Civil Proc. § 1855.

The writing offered as a copy of an original must be proved to be such before it can be admitted in evidence. If properly certified to be such, it is admissible. Or, if shown to be such by a witness who compared it with the original, it is admissible. In any event, it must be shown to be a copy of the original writing before it can be admitted in evidence. The contents of the lost original can only be proved by copy or oral evidence. Any other mode of proof is excluded.

If the Code had provided that the contents of a lost writing might be proved by a copy of a certified copy of such lost instrument, then a question might arise whether it would not be necessary to prove the loss or destruction of the latter in order to make a copy of it admissible to prove its contents. The Code makes a distinction between proof of the contents of a lost instrument by copy and by oral evidence. The court admitted the writing offered in evidence in this case as a copy, not of the original, because the only witness who testified in relation to it distinctly stated that it was not copied from

the original petition on file in the office of the clerk of the board of supervisors, but from a reporter's notes of testimony in the case of *Dyer v. Krause*, in which said certified copy had been in evidence.

We do not doubt the inadmissibility of the writing admitted in evidence for any purpose, and under such circumstances the objection that it was incompetent was sufficient. It was not shown to be a copy of the original, and it was then too late to compare it with the original, as it was shown that the latter could not be found. It was not a case in which the objection might have been obviated if the ground of the objection had been elaborately stated. Oral evidence of the contents of the original petition was introduced on both sides. That introduced by the defendant tended to prove that the owners of the requisite number of feet fronting on the street graded had not signed the petition, while that introduced by the plaintiff tended to prove the exact reverse. Under such circumstances we cannot hold that the admission in evidence of what is claimed to be a copy of a certified copy of the original petition might not have been prejudicial to the plaintiff. Had it been admissible, it would have been conclusive of the fact which the defendant sought to establish.

Order reversed.

We concur: MYRICK, J.; ROSS, J.; MCKEE, J.; MCKINSTRY, J.; MORRISON, C. J.

2 Cal. Unrep. 333

HUGHES v. MENDOCINO Co. (No. 8,155.)

Filed June 28, 1884.

RES ADJUDICATA — JUDGMENT ON CLAIM REJECTED BY BOARD OF SUPERVISORS.

Each claim presented to and rejected by a board of supervisors constitutes a distinct and separate cause of action, and a judgment obtained on one will constitute no bar to an action for the recovery of the others.

Department 2. Appeal from the superior court of Mendocino county.

This was an action against the defendant county for personal services rendered, for which plaintiff presented to the board of supervisors his several claims, which claims were rejected. Defendant in the answer denied the validity of a portion of the claims, and set up the fact the plaintiff had already recovered one judgment against the defendant for a portion of such claims, and that the action on the rest of such claims is therefore barred.

Archibald Yell, for appellant.

Thos. B. Bond, for respondent.

BY THE COURT. Unless the plaintiff's action was barred by the former judgment, the defendant was not materially prejudiced by

any of the alleged errors, and the judgment should not be reversed for any error which does not affect the substantial rights of the parties. In our opinion, the former judgment, which it is claimed constitutes a bar to this action, cannot be held to have that effect.

We think each claim presented to and rejected by the board of supervisors constituted a distinct and separate cause of action, and that a judgment obtained on one would constitute no bar to an action for the recovery of the others.

Judgment and order affirmed.

65 Cal. 365

PORTER and Wife v. CHAPMAN. (No. 7,902.)

Filed June 28, 1884.

HOMESTEAD—ABANDONMENT.

A homestead cannot be abandoned except in the statutory mode; and a removal from the premises, even to another state, becoming a citizen thereof, voting in its elections, and being offered as a candidate for office therein, where there is no intention to relinquish a residence in this state, is not such an abandonment.

Department 2. Appeal from the superior court of Solano county.

O. R. Coghlan and Moore, Laine & Johnson, for appellant.

Joseph McKenna, for respondent.

BY THE COURT. The homestead, regularly declared to be such, was not abandoned by the removal of the husband, Porter, from the premises, and residing with his family elsewhere in the state, or by his removal from the state to the territory of Arizona with his family when employed to go there by Clark, and remaining in such employment since April, 1877, becoming a citizen of the territory, voting in its elections, and offering himself as a candidate for office therein. It is found that when Porter and wife removed from their homestead they did not intend to relinquish or abandon it, but intended to return thereto and make it their home, and that Mrs. Porter accompanied her husband to Arizona because she believed it was her duty to do so, and with no intention to relinquish her residence in this state, understanding that her absence was only to be temporary; and during all the time she lived in the territory she claimed to be a resident of California, to have her homestead in Suisun, and intended to return thereto and occupy it as a home.

The removal and residence above mentioned were not an abandonment. See section 2 of Act of 1851, as amended in 1862; St. 1862, p. 519; and Civil Code, §§ 1243, 1244. Nor was it abandoned by the mortgage to Reeves, by husband and wife, as security for money, and a reconveyance by Reeves to the husband, when the debt secured was paid Reeves by him. Under our law we know of no

abandonment of the homestead except in the statutory mode. The homestead having once been regularly created out of a parcel of land, in accordance with the statute, the estate so created continues to exist until put an end to in the mode pointed out by the statute. The grounds of abandonment urged are not within those fixed and recognized by the statute. In our decisions in regard to homesteads, we are bound to follow the statutes on the subject. If hard cases should arise, a provision for avoiding them must be by an alteration of the law by the legislative department of the government. The courts are, in this regard, without power.

Judgment affirmed.

65 Cal. 363

HUNDLEY v. CHANEY. (No. 9,104.)

Filed June 28, 1884.

INSOLVENCY—EFFECT OF DISCHARGE—EXISTING JUDGMENT.

A discharge in an insolvency proceeding under the law of April 16, 1880, is a good defense to a judgment rendered against him in 1876.

Department 2. Appeal from the superior court of Butte county.
Jones & Lusk, for appellant.

Warren & Hensha, for respondent.

THORNTON, J. Action on a judgment rendered in August, 1876. This action was commenced on the fourteenth of June, 1881. Defendant set up a discharge from this debt on the fourteenth of March, 1881, in an insolvency proceeding under the act of April 16, 1880. See St. 1880, p. 82. Judgment passed for defendant, and from it plaintiff prosecutes this appeal.

It is contended on behalf of appellant that the discharge under the act of 1880 does not affect this debt, which was contracted and existed prior to the passage of that act, the plaintiff having in no manner, whether by paying his debt or otherwise, submitted himself to the jurisdiction of the court adjudging the discharge, or made himself a party to the proceedings in insolvency. To sustain this contention, we are referred to several cases: *Sturgess v. Crowinshield*, 4 Wheat. 122; *Bank v. Smith*, 6 Wheat. 131; *McMillan v. McNeill*, 4 Wheat. 209; *Ogden v. Saunders*, 12 Wheat. 213; *Conway v. Seamons*, 55 Vt. 8; 28 Alb. Law J. 190. This general rule is, no doubt, the true and correct one, established by abundance of authority. Under the insolvency act as it stood prior to the act of 1880, which was repealed by the act of 1880, except so far as it was not in conflict with the latter act, with a proviso that such latter act should in no manner invalidate or affect any case in insolvency instituted and pending when it took effect,—section 68, Act 1880, (St. 1880, p. 99,)—the defendant might have obtained his discharge from the debt herein. When we

speak of the prior act of insolvency, however, we mean the act of 1852 as amended. So far as the prior act is consistent with the provisions of the act of 1880, it continued in force and was allowed to remain the law of the land. The proceeding involved in this case is one instituted by the debtor, styled in the act of 1880 one of voluntary insolvency. The modifications introduced by the latter act imposed greater burdens on the debtor applying for a discharge under it, than those imposed by the prior act. By a comparison of these acts, it will be seen that by the former act any debtor might apply to be discharged whether his indebtedness amounted to \$300 or not. Act 1852, §§ 1, 2. Under the act of 1880, the debtor applicant must be indebted to the amount of \$300. Sections 1, 2, Act 1880. The schedule alone is required to be sworn to under the prior act. Sections 1, 2, 3, 4, Act 1852. The act passed in 1880 requires the petition, schedule, and inventory to be verified. Sections 1, 2, 3, 4, 6, Act 1880. No inventory or valuation are mentioned in the former act, as in the latter. Sections 2, 4, Act 1880. The first act required notice of meeting of creditors to be given by publication. Section 8. The latter act, by publication and service of copy of order for such meeting by mail, with postage prepaid, or personally on all creditors named in the schedule. Sections 6, 7. Under the former act, the debtor was entitled to be discharged, on a surrender of his property made according to the provisions of the act, when there was an accusation of fraud, and such charge has been declared to be unfounded, or if there be no opposition to the surrender. Section 24. Under the latter act, no discharge can be granted until after three months from the adjudication in insolvency, and that upon notice to all the creditors who have proved their debts, which notice is to be given to such creditors by publication and by mail. The provisions in relation to discharge are more stringent under the act of 1880 than under the act previously existing. This will be seen by comparing section 48 of the act of 1880, with sections 20, 21, 22, 23, 28, of the act as it formerly stood. It will thus be seen that greater burdens are imposed by the act of 1880 on the debtor than by the act as it was when the debt involved herein was contracted.

The debtor had a right under the former law to be discharged from this debt. The existing law (act of 1880) requires more of the debtor than the former one. The latter act is in effect a continuation of the former one, with provisions more stringent and burdensome imposed on the insolvent. We think that under these circumstances the debtor was entitled to his discharge. Such was the ruling of the supreme court of New York in regard to their insolvent laws. See *Bryar v. Willcocks*, 3 Cow. 164; *Mather v. Bush*, 16 Johns. 246, 251; *Matter of Wendell*, 19 Johns. 153. The defendant, under the act existing before the act of 1880, was entitled to his discharge. Such was the law under which the contract was made. The parties had this law in contemplation, and had no thought of the act of 1880 when

the contract was made. Should, then, the defendant be denied his discharge because he has complied with an act requiring more of him than the prior act? We think not. *Bryar v. Willcocks, supra.*

Judgment affirmed.

MYRICK and SHARPSTEIN, JJ., concurred.

2 Cal. Unrep. 334

ESTATE OF CROZIER, Deceased. (No. 9,145.)

Filed June 30, 1884.

PRACTICE APPEAL—COSTS.

No error appearing from the transcript on appeal, the order amending judgment as to costs is affirmed.

Department 2. Appeal from the superior court of San Joaquin county.

Louittit & Lindley and J. S. Terry, for appellant.

Byers & Elliot, Campbell & Muentner, and W. L. Dudley, for respondent.

BY THE COURT. The court entered judgment May 29, 1883. On the thirteenth of June, 1883, the court made an order amending the judgment as to costs, directing the same to be paid in due course of administration. Code Civil Proc. § 1332. It does not appear that any error was committed. For aught that appears in the transcript, due notice of motion to amend was given, and hearing had thereon.

Order affirmed.

SUPREME COURT OF CALIFORNIA.

65 Cal. 375

In re Application of MORRISON BRYAN. (No. 9,648.)

Filed July 12, 1884.

CONDEMNATION PROCEEDINGS—TAKING POSSESSION OF LAND—REMEDY.

In a proceeding for condemnation the superior court has full jurisdiction to prevent plaintiff from taking possession of the land sought to be condemned; and if plaintiff does so take possession, in advance of the order of the court allowing him to do so, defendant has a plain, speedy, and adequate remedy at law, by recourse by a motion to the superior court to have the possession restored to him.

Department 2. Application for writ of review.

Jackson Hatch, for petitioner.

By THE COURT. The application for a writ of review herein must be denied. In our judgment the superior court in which the proceeding for condemnation was brought has full jurisdiction to prevent the plaintiff, or any one claiming under it, from taking possession of the land sought to be condemned, until the order for such taking possession had been made by said court. Code Civil Proc. §1254. If possession has been taken in advance of such order by the court allowing plaintiff to take possession, the superior court has power to have the possession restored to the defendant. Hence the applicant has a plain, speedy, and adequate remedy at law, by recourse by motion to the superior court above referred to.

Writ denied and application dismissed.

SUPREME COURT OF CALIFORNIA.

65 Cal. 340

ARATA v. TELLURIUM G. & S. MINING Co. and others. (No. 9,266.)

Filed July 15, 1884.

Opinion rendered June 17, 1884, (*ante*, 195,) modified.

Department 1. Appeal from the superior court of Amador county.

Motion for modification of opinion.

Eagan & Armstrong, for appellants.*D. B. Spagnoli*, for respondents.

BY THE COURT. Ordered that there be stricken from the opinion heretofore filed herein the clauses which read as follows:

"Again, the court struck out the answer, ordered default to be entered, and thereupon ordered that 'plaintiff take judgment as prayed for in the complaint.' The judgment prayed for is: 'Wherefore, said claimant, Edward A. Ketchum, claims the benefit of the law to liens of mechanics and others upon real property, to-wit, chapter 2, tit. 4, pt. 3, of the Code of Civil Procedure.' It is quite evident that a judgment in the form prayed for cannot be entered by default. When the answer was stricken out and default entered, defendants stood in the same position as if they had failed to answer. There is no prayer in the complaint for other and further and general relief upon which a court of equity could base an appropriate decree."

65 Cal. 394

CALIFORNIA SOUTHERN R. Co. v. SOUTHERN PAC. R. Co. (No. 9,024.)

Filed July 18, 1884.

1. EMINENT DOMAIN—RESIDENCE OF CORPORATION.

As there is no law in this state defining what is the place of residence of a corporation, section 395, Code Civil Proc., has no application to a proceeding to condemn the lands of a corporation.

2. SAME—PROCEEDINGS TO CONDEMN LAND—WHERE BROUGHT.

Proceedings in regard to eminent domain, according to section 1243, Code Civil Proc., must be brought in the superior court of the county in which the property is situated.

Department 2. Appeal from the superior court of San Bernardino county.

A. B. Hotchkiss, for appellant.*Cooper & Luce*, for respondent.

THORNTON, J. This is an appeal from an order refusing to change the place of trial. The proceeding was instituted to condemn land in

the county of San Bernardino, and was commenced in the superior court of that county. It is contended that the order is erroneous, for the reason that the city and county of San Francisco is the principal place of business of the defendant corporation, and therefore its residence; and as such city and county is the residence of the corporation, it is the proper county for the trial of the proceeding, and the place of trial should be changed to such city and county. To sustain this contention we are referred to the case of *Jenkins v. California Stage Co.* 22 Cal. 537. What is said in this case does seem to sustain the point contended for. But we do not think that this decision is a proper exposition of the statute referred to in it, nor do the authorities cited in the opinion sustain the conclusion reached, that the principal place of business of a corporation is its residence, within the meaning of section 395, Code Civil Proc. *Louisville, etc. R. Co. v. Letson*, 2 How. (U. S.) 497, has reference to the competency of a corporation, under the constitution and laws of the United States, to be sued in the federal courts, and its quality of citizenship of a state. It had no reference to its residence in a county. Sections 6, 265, 404-407, and 440, Ang. & A. Corp., are also referred to in the opinion. They relate to cases involving the construction of statutes, very different in their language from the statute of this state, and have little or no bearing on the point under consideration. These cases are mentioned in the text or notes of the work referred to, to which recourse can be had by those desiring to examine them. We do not think it requisite to make further reference to them.

There is no law, statutory or common, in this state which defines the place of residence of a corporation. The fact that the residence of the officers and agents of a corporation is in a particular county, does not in our judgment make such county the place of residence of the corporation. If such residence of officers in a particular county makes such county the place of residence of the corporation, how will it be when some of the officers reside in one county and some in another? We are referred to no law making the county where the principal place of business of a corporation is situated, the place of its residence; and under these circumstances we have no authority to hold such to be its place of residence. There being no law defining what is the place of residence of a corporation, we must hold that section 395, Code Civil Proc., has no application here.

The conclusion here reached is sustained in our judgment by section 1243, Code Civil Proc., requiring all proceedings under the title in regard to eminent domain, *to be brought* in the superior court of the county in which the property is situated. This language means something more than that the proceeding must be commenced in such superior court. There are strong reasons why such proceeding should be had in the county where the land sought to be condemned is situated. The compensation for the land sought to be taken is to

be determined upon testimony, and the witnesses most competent to speak upon this subject will usually be found in the county referred to.
Order affirmed.

We concur: SHARPSTEIN, J.; MYRICK, J.

CALIFORNIA SOUTHERN R. Co. v. SOUTHERN PAC. R. Co. (No. 8,959.)

Filed July 18, 1884.

JUDGMENT AFFIRMED.

On the authority of *California Southern R. Co. v. Southern Pac. R. Co.*, ante, 344, judgment and order affirmed.

Department 2. Appeal from the superior court of San Bernardino county.

The facts in this case are the same as in *California Southern R. Co. v. Southern Pac. R. Co.*, ante, 344.

A. B. Hotchkiss, for appellant.

E. Cooper and Byron Waters, for respondent.

By THE COURT. The questions involved in this appeal are the same as those considered and determined in No. 9,024, and for the reasons given in the opinion filed in that case the judgment and order in this case are affirmed.

2 Cal. Unrep. 334

REYNOLDS v. SCOTT. (No. 9,480.)

Filed July 18, 1884.

1. PRACTICE—NEW TRIAL—CONDITION.

A new trial may be granted conditionally upon failure of one of the parties to perform certain conditions, as the payment of costs and expenses.

2. SAME—CONFLICTING EVIDENCE.

Where the evidence is conflicting, the order granting a new trial will not be disturbed.

Department 2. Appeal from the superior court of Los Angeles county.

This was an action for the recovery of certain goods. Judgment was rendered for plaintiff. Defendant moved for a new trial, which was granted on condition that plaintiff failed to comply with the order of court; awarding to defendant costs and expenses of suit. The other facts appear in the opinion.

Smith & Hupp, for appellant.

P. W. Dorner, for respondent.

SHARPSTEIN, J. The fact of the court having made the order granting a new trial dependent on the plaintiffs' failing to do certain things, is, in our judgment, an immaterial circumstance. It is not claimed that the plaintiffs did that which, according to the terms of the order, would have defeated it. If we can discover any ground on which the court would be justified in granting a new trial, the order must be affirmed. There was evidence which tended to prove that the goods, which this action was brought to recover the possession of, were shipped at Cincinnati by the defendants Scott & Co., consigned to themselves at Los Angeles, and that the bill of lading was delivered by them to the defendants S. Kuhn & Sons, who forwarded it, with a draft on the plaintiffs for what was claimed to be the price of the goods, to a bank at Los Angeles, with directions to deliver the bill of lading to the plaintiffs on payment of the draft; that the draft was presented to plaintiffs for payment, and payment was refused, whereupon the bill of lading and draft were returned to defendants S. Kuhn & Sons. The goods arrived at Los Angeles, and after being kept the usual length of time by the railroad company, were removed to Naud's warehouse, and stored for the consignees, Scott & Co., with directions to hold the goods subject to the order of Richard Gray, general freight agent of the railroad company. The defendants Scott & Co. and S. Kuhn & Sons were not served with process, nor did they appear in the action. The defendants who did appear and against whom the judgment was entered were Henry and Weyse, the latter the owner of and the former an employe in Naud's warehouse. If the delivery of the goods to the common carrier at Cincinnati was a delivery to the plaintiffs, the latter could not take them from the possession of the former without paying the legitimate charges for transportation, and it is at least questionable whether such charges in full have been paid or tendered.

There were two questions which had to be determined in favor of the plaintiffs before they could recover possession of the property: *First*, that it had been delivered to them; *second*, that the transportation charges had been paid or tendered to the common carrier. As to the delivery, it is sufficient to say that the fact of the alleged vendors' having taken a bill of lading, in which they were designated as consignees, militates very strongly against the position of the plaintiffs that the goods were delivered to them.

In Benj. Sales (3d Amer. Ed.) § 399, it is laid down as a rule that "where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading as the one to whom they are to be carried. The fact of making the bill of lading deliverable to the order of the vendor, is, when not rebutted by evidence to the contrary, almost decisive to show his intention to reserve the *jus disponendi*, and to prevent the property from passing to the vendee." *Id.*

We have recited a sufficient number of facts to show that the evidence, when viewed in the most favorable light for the plaintiffs, was conflicting upon the most material issues in the case; and if, as we must assume, the preponderance of evidence in the opinion of the court below was against the plaintiffs, that court was justified in granting a new trial, and this court would not be justified in disturbing that order.

Order affirmed.

We concur: THORNTON, J.; MYRICK, J.

65 Cal. 396

PEOPLE v. MULLAN. (No. 9,457.)

Filed July 18, 1884.

PRACTICE—SERVICE BY PUBLICATION—JUDGMENT.

A judgment following a service of summons purporting to be by publication, but which was made without affidavit and order, is void, and a motion to set aside the judgment is a direct and not collateral attack.

Department 2. Appeal from the superior court of San Bernardino county.

Satterwhite & Curtis, for appellant.

R. E. Bledsoe, for respondent.

THORNTON, J. The motion to set aside the judgment is a direct and not collateral attack. The moving party offered to show that there was no service of summons on Mullan. The service purported to be by publication, and the specific offer was to show that no affidavit for publication of summons was ever made, and that there was no order made authorizing such publication. On objection by plaintiff the offer was rejected, and an exception was reserved. The judgment, if rendered as offered to be shown, was void. If Mullan was the mover, such ruling would undoubtedly be error. He would be entitled to show that the judgment was entered without authority of law. The motion is made by the Cucamonga Company, a corporation to which the land involved in the action had been conveyed, and a certificate of purchase therefor assigned by Mullan on the twentieth of October, 1881. This was after the judgment attacked had been entered, which was on the fourth day of January, 1881. But we regard the corporation as in legal effect the assignee and legal representative of Mullan, and standing in his shoes. We think the motion was well made. Code Civil Proc. § 473; *U. S. v. Patterson*, 15 How. (U. S.) 12. The company could have moved in the name of Mullan, and it has substantially done this. We should be sacrificing form to substance, to hold otherwise. The same remarks apply to the appeal.

The court below erred in its ruling. The order is therefore reversed, and the cause remanded, to be proceeded with according to what is here said.

We concur: SHARPSTEIN, J.; MYRICK, J.

65 Cal. 387

BAILY v. SLOAN. (No. 9,415.)

Filed July 18, 1884.

1. JURISDICTION—SUPERIOR COURT—AMOUNT.

The superior court has jurisdiction of an action for separate sums due plaintiff by defendant, neither of which amount to \$300, but which, according to the *ad damnum* clause of the complaint, exclusive of interest, exceeds \$300. The *ad damnum* clause of the complaint is the test of jurisdiction.

2. PRACTICE—DEFAULT.

No answer being filed, and the time for leave to answer having expired, the clerk is authorized to enter the default of defendant, and a judgment for the amount specified in the summons.

3. SAME—OVERRULING DEMURRER—JUDGMENT ROLL.

Notice of overruling a demurrer is no part of the judgment roll, and the question of failure to give such notice cannot be considered on an appeal from the judgment. The proper remedy is for defendant to move in the court below to set aside the default and judgment on that ground, and, if the motion is denied, to appeal from the order denying such motion.

Department 2. Appeal from the superior court of Kern county.
Robert Harrison, for appellant.

J. W. Freeman, for respondent.

SHARPSTEIN, J. The demurrer was properly overruled. The demand, according to the *ad damnum* clause of the complaint, exclusive of interest, exceeds \$300. The *ad damnum* clause of the complaint is the test of jurisdiction. *Maxfield v. Johnson*, 30 Cal. 545; *Solomon v. Reese*, 34 Cal. 28; *Sanborn v. Super. Ct. Contra Costa Co.* 60 Cal. 425; *Dashiell v. Slingerland*, Id. 653. No answer was filed, and the time within which the defendant was granted leave to answer having expired, the clerk was authorized to enter his default, and a judgment for the amount specified in the summons. Code Civil Proc. 585. As the appeal is from the judgment alone, we have nothing before us except the judgment roll, in which notice of the overruling of his demurrer would not appear, even if such notice had been given. If none was given, and the defendant wished to avail himself of the omission, he should have moved, in the court below, to set aside the default and judgment on that ground, and, if his motion had been denied, appealed from the order denying such motion. In that way alone could he have got the question, which he now seeks to raise, before this court.

Judgment affirmed.

We concur: THORNTON, J.; MYRICK, J.

65 Cal. 389

HAYFORD v. KOCHER. (No. 9,291.)

Filed July 18, 1884.

1. PRACTICE—APPEAL—FINDING.

On an appeal from the judgment alone, it will be assumed that the findings are supported by the evidence.

2. HOMESTEAD—HUSBAND AS TRUSTEE.

A homestead cannot be selected by the wife out of property as to which the husband has only the naked legal title in trust for a third party, and a selection under such circumstances does not affect such third party.

3. SAME—EQUITY—REFORMATION OF CONVEYANCE.

Equity looks on that as done which ought to be done. Therefore, no new right is conferred on a defendant by the reformation of a conveyance to him. The agreement vests the property; the instrument is simply the evidence of the agreement, and, if it does not truly express the agreement, may be reformed at the suit of either party.

Department 2. Appeal from the superior court of Merced county.

Moore, Laine & Johnston, for appellants.

Breckenridge & Farrar, for respondents.

SHARFSTEIN, J. The appeal being from the judgment alone, we are bound to assume that the findings are supported by the evidence. It appears, then, that the demanded premises were intended to be, but, by mutual mistake, were not, included in a conveyance of certain lands executed by the plaintiff Flavel Hayford to the defendant, Catherine Kocher. Afterwards, in an action brought by said Kocher against said Hayford to have said conveyance reformed so as to include the demanded premises, a decree for such reformation was duly made and entered. After the execution of said conveyance, and before the commencement of said action for its reformation, the plaintiff Lydia A. Hayford, the wife of said Flavel Hayford, selected said premises as a homestead in the manner and form prescribed by the Code. At the time of making such selection she knew of the intention of the parties to said conveyance to include said premises therein, and that they had been omitted by the mutual mistake of said parties. The right of the plaintiffs to recover the demanded premises depends on the validity of the selection of them by Lydia A. Hayford as a homestead, in the manner and under the circumstances above stated. "If the claimant be married, the homestead may be selected from the community property, or the separate property of the husband, or, with the consent of the wife, from her separate property." Civil Code, 1238. It can only be selected from the property of one or both of the spouses. When this selection was made the demanded premises were not the property of either or both of the plaintiffs. One of them held the naked legal title. But he held it in trust for the defendant, Kocher. Under such circumstances the premises selected were not the property of the plaintiffs, or either of them, and the defendant could not be divested of her rights in

it by the selection of it as a homestead by one or both of the plaintiffs. Such selection merely converted the property which one or both of the plaintiffs had in the premises into a homestead. It could not affect the pre-existing rights of the defendant, Kocher, in the property. And she had a right to have the conveyance from one of the plaintiffs to her reformed, so as to include the demanded premises.

Equity looks on that as done which ought to be done. By the reformation of the conveyance of Flavel Hayford to the defendant, Kocher, no new right was conferred on the latter. The instrument was reformed so as to express truly the intention of the parties. It was the agreement to convey the premises to the defendant, Kocher, which vested in her the property. The deed was simply the evidence of that agreement and intention, and if it did not truly express them, it was the right of either party to have it so reformed that it would.

None of the other alleged errors affects the substantial rights of the parties and it is therefore unnecessary to discuss any of the other points presented by appellants. Code Civil Proc. 475.

Judgment affirmed.

We concur: THORNTON, J.; MYRICK, J.

SUPREME COURT OF CALIFORNIA.

2 Cal. Unrep. 337

CITY OF STOCKTON v. DAHL and others. (No. 8,506.) ¹

Filed July 18, 1884.

STREET ASSESSMENTS—ASSESSMENT LISTS—EVIDENCE—PLEADING.

Under the provisions of the statutes, as applied to actions to enforce street assessments, the assessment lists do not prove even *prima facie* that the city council "has caused a survey and estimate to be prepared of proposed work, to be filed with the city clerk," or "fixed a time for the hearing upon such proposition," or ordered work or improvements to be done; nor are the lists evidence of a publication of notice soliciting bids, or of the awarding of a contract, or of any of the acts of officers of the municipality which precede, at least, the doing of the work. None of these acts separately, or all of them together, constitute the levy of an assessment, yet all of them must be averred, and, if they are denied, must be proved by competent evidence.

Department 1. Appeal from the superior court of San Joaquin county.

S. L. Carter and J. A. Louttit, for appellant.

Byers & Elliot, for respondent.

By THE COURT. 1. A general demurrer that the complaint, as amended, does not state facts to constitute a cause of action, was *overruled* by the court below, and, after trial, judgment was ordered and entered for defendant. Respondent now contends that the judgment should be affirmed, because the demurrer ought to have been sustained, for certain reasons:

First. As against a general demurrer, at least, the averment in the complaint, "Market street, in said city, * * * was, on or about the first day of January, 1879, and ever since has been, an open, public street, used as such, and dedicated to the public use in said city of Stockton, in the county of San Joaquin, state of California," is a sufficient averment that the street named is in the city of Stockton.

Second. The complaint alleges that the resolution of intention was published as required by the city council.

Third. If the notice soliciting bids was actually published, it is unimportant that a portion of a resolution of the council directed the *street committee* to solicit bids.

The charter does not require, when an order is made that work be done, the council shall in terms direct the clerk to advertise for bids, or that the contents of the notice to be published by the clerk shall be set forth in the resolution ordering work, unless, perhaps, when the work is the building, etc., of sidewalks, or the estimated cost does not exceed one hundred dollars (St. 1871-72, p. 606, § 26.) Section 27 of the charter provides that "a notice signed by the clerk" shall be published. The complaint avers that a notice, signed by

the clerk, containing the requirements of the statute, was published for a time stated, being the time required by the law.

Fourth. A resolution of the council appointed the street committee to award the contract, etc. The statute (page 606, § 27) empowers the council, "or its committee therefor appointed, * * * to open and declare said bids and award the contract." It requires this to be done "in open meeting" of the council or committee, as the case may be. The complaint alleges it was so done.

Fifth. The statute (page 608, § 29) gives an appeal to the council by any person claiming to be aggrieved by the assessment, and authorizes the council to "correct, alter, or modify" an assessment. We know of no constitutional inhibition upon such legislation.

Sixth. The complaint *does* allege proper publication of notice that the council would sit at a certain time to hear appeals.

2. At the trial in the court below the plaintiff gave in evidence the *assessment lists*, showing list of delinquents, of whom defendant appeared as one, and rested. The defendant offered no evidence. Section 29 of the charter provides: "Such lists may be used as evidence in any suit, in the same manner and with like effect as is provided for city delinquent tax lists by this act." The provision with reference to city delinquent tax lists is that they "shall be evidence in any court to prove the delinquency, property assessed, the amount of taxes due and unpaid, and that all forms of law in relation to the *levy and assessment* of said taxes have been complied with." St. 1871-72, p. 604, § 21. It is quite evident that under these provisions of the statute, as applied to actions to enforce street assessments, the assessment lists do not prove, even *prima facie*, that the city council "has caused a survey and estimates to be prepared of proposed work, to be filed with the city clerk," or "fixed a time for the hearing upon such proposition," or ordered work or improvements to be done. Nor are the lists evidence of a publication of notice soliciting bids, or of the awarding of a contract, or of any of the acts of officers of the municipality which precede, at least, the doing of the work. None of these acts separately, nor all of them together, can be said to constitute the "levy" of an assessment. Yet all of them must be averred, and if, as in the case before us, they are denied, they they must be proved by competent evidence.

Judgment and order affirmed.

2 Cal. Unrep. 339

BIGGERSTAFF v. BRIGGS. (No. 9,421.)

Filed July 18, 1884.

1. CONTRACT—PLEADING—ACTION FOR BREACH OF CONTRACT.

In an action for breach of contract it is not necessary to allege as part of the contract, which was for excavating and cutting ditches by machine, that the machine should be so employed as not to injure defendant's vines; stipulations necessary to make a contract reasonable are implied.

2. SAME—DAMAGES—EVIDENCE.

Evidence of the expense of digging a ditch in a manner materially different from the mode provided as a test of value in the contract alleged by plaintiff was irrelevant, because he was not entitled to recover anything unless the actual contract was substantially the same as that by him alleged.

3. SAME—PERFORMANCE—NOTICE.

Where plaintiff swore to an offer to commence work, he is entitled to prove facts tending to show how he was prevented from performing his contract, and for that purpose may testify to a message delivered to him by the foreman of defendant. The question of agency is for the jury.

4. SAME—QUESTION FOR JURY.

It is a question for the jury whether a notice to defendant was left at his residence with his wife, and whether it reached him.

Department 1. Appeal from the superior court of Yolo county.

This was an action for damages for a breach of contract. Defendant had agreed to hire plaintiff to cut 200 miles of ditch with his ditching machine, at one-half the price the same would cost to cut by hand, such price to be ascertained by cutting one mile by hand in a specified manner. Plaintiff alleges that he was ready to perform the work, when defendant notified him not to proceed. The court rendered judgment for plaintiff. Defendant appealed.

J. C. Ball and *J. Craig*, for appellant.

W. B. Treadwell and *F. E. Baker*, for respondent.

BY THE COURT. 1. Appellant contends the verdict was not sustained by the evidence, because the evidence showed, while the complaint does not allege, that it was part of the agreement between the parties that the *axle* of the ditching machine should be shortened, if necessary, so that the wheels should run between the rows of vines. But it was not necessary to allege, as part of the contract, that the machine should be so employed as not to injure defendant's grapevines. Stipulations necessary to make a contract reasonable are *implied*. Civil Code, 1655. "If the parties expressly provide, not anything different, but the very same thing which the law would have implied, this provision may be regarded as having been made twice—by the parties and by the law. * * * The expression of those things which the law implies works nothing." 2 Pars. Cont. side p. 515.

2. Appellant also contends the contract proved differed materially from the contract alleged, in that the evidence shows the contract to have been that the ditch was to be 10 inches wide and 20 inches deep, with a *concave bottom*, suitable for the reception of irri-

gating pipes, while the complaint alleges the ditches "were to be cut of uniform width of ten inches, and excavated to a uniform depth of twenty inches." The complaint, however, alleges the ditches were to be cut with a certain machine, which, there was evidence tending to prove, would form a concavity at the bottom.

3. The court did not err in sustaining the objection to the question asked the witness Gould, as to how much it would be worth to excavate a ditch in a manner materially different from the mode provided in the contract, as alleged in the complaint. The court charged the jury:

"In this case the plaintiff must prove the contract as alleged in the amended complaint, and, unless you find from the evidence that the defendant agreed upon and understood all the parts of the contract, as set forth in said amended complaint, you must find a verdict for the defendant."

Evidence of the expense of digging a ditch in a manner materially different from the mode provided, as a test of value, in the contract alleged by plaintiff, was irrelevant, because plaintiff was not entitled to recover anything unless the actual contract was substantially the same as that by him alleged.

4. The instructions requested by defendant (the same being copied from two separate subdivisions of section 2061 of the Code of Civil Procedure) had already been given by the court.

5. It was not error to allow the plaintiff (who testified Bartlett was Briggs' foreman) to testify to a message delivered to him by Bartlett from the defendant. The question of Bartlett's agency was one of fact for the jury. Plaintiff swore to an offer to commence work, and was entitled to prove facts tending to show how he was prevented from performing his contract.

6. It was a question of fact for the jury whether a notice to defendant was left at his residence with his wife, and whether such notice reached him. The testimony of the witnesses plaintiff and Hutchins, given after the defendant rested, with reference to the delivery of such written notice to the wife of defendant, was not objected to on the ground that it was not proper as evidence in *rebuttal*.

7. Any testimony which the witness Blowers might have given in respect to the cost of digging a ditch such "as he had described" would have been irrelevant. He had described a ditch entirely different from that provided for by the contract between the parties.

Judgment and order affirmed.

2 Cal. Unrep. 342

WEINER v. KORN. (No. 7,635.)

Filed July 18, 1884.

APPEAL—BILL OF EXCEPTIONS—CERTIFICATE OF JUDGE.

Where there is no bill of exceptions, nor certificate of the judge that the papers printed in the transcript were used on the hearing of the motion which resulted in the making of the order appealed from, the order will not be reviewed.

Department 2. Appeal from the superior court of Merced county.

Bennett & Wigginton, for appellant.

J. K. Law, for respondent.

By THE COURT. This is an appeal from an order that an execution issue in the above-entitled action. There is no bill of exceptions, nor certificate of the judge of the court in which the order was made that the papers printed in the transcript were used on the hearing of the motion which resulted in the making of the order appealed from. Under such circumstances we cannot review that order.

Order affirmed.

65 Cal. 335

CUNNINGHAM v. SKINNER. (No. 8,171.)

Filed July 18, 1884.

PLEADING—ACTION FOR RECOVERY OF PERSONAL PROPERTY—SUFFICIENCY OF DENIALS.

The denial that the plaintiff is the owner of the personal property described in the complaint, and the allegation that the defendant "has not sufficient information or belief upon the subject to enable him to answer" the allegation of the plaintiff that he is entitled to the possession of said property, "and on that ground he (defendant) denies the same," is sufficient to put in issue the allegation of the plaintiff that he is the owner and entitled to the possession of said property. Code Civil Proc. 437.

Department 2. Appeal from the superior court of Santa Cruz county.

F. I. McCann, for appellant.

J. M. Lesser, for respondent.

By THE COURT. The denial that the plaintiff is the owner of the personal property described in the complaint, and the allegation that the defendant "has not sufficient information or belief upon the subject to enable him to answer" the allegation of the plaintiff that he is entitled to the possession of said property, "and on that ground he (defendant) denies the same," are sufficient to put in issue the allegation of the plaintiff that he is the owner and entitled to the possession of said property; and the court erred in holding on the trial that it was not. Code Civil Proc. 437.

Judgment reversed.

2 Cal. Unrep. 343

REYNOLDS v. WESTON. (No. 8,150.)

Filed July 19, 1884.

TRUST—ACTION TO DETERMINE PROPERTY RIGHTS—TRUST DEED.

In an action to determine the rights to property under a deed of trust, the court must follow the provisions of the trust, and, where such trust provides for the sale of the whole of such property, the court is not authorized to order a sale of a part thereof.

Department 2. Appeal from the superior court of Santa Clara county.

This was a proceeding to determine the rights of parties to property under a deed of trust. The provisions of such trust were that the trustee should conduct certain litigation regarding the trust property, and when the same was settled sell the property and make certain dispositions of the proceeds. The lower court decreed that the trustee should hold the land till the litigation "be terminated as to the whole or any part of the premises, or when the litigation concerning the premises or any part thereof shall have been otherwise finally ended," the trustee might proceed to sell the same under the directions of the trust. The other facts appear in the opinion.

Wm. L. Gill, for appellant.

C. D. Wright, for respondent.

BY THE COURT. The decree seems to follow the provisions of the deed of trust in authorizing a sale of the premises conveyed to the plaintiff when he shall obtain possession thereof by virtue of a judgment in an action then pending, in which the right of possession was involved, except in the particular hereinafter noted. As to the compensation to which the court found plaintiff entitled, and decreed that he should be paid out of the proceeds of said sale, we are not prepared to say that the amount is unreasonable. The deed contained the agreement that Reynolds should hold the land until the litigation be finally ended; the decree authorizes a sale when the litigation be finally disposed of as to the whole or any part of said premises. The decree should be modified by striking out the words "or any part" and "or any part thereof." The court below is directed to modify the decree in this particular, and in all other respects the judgment is affirmed.

65 Cal. 391

DEAN v. APPLEGARTH. (No. 8,825.)

Filed July 18, 1884.

MORTGAGE—DEFAULT—INTEREST.

A stipulation in a mortgage that on default in payment of interest all moneys secured shall become due and payable at the option of the mortgagee, and not otherwise, requires that such option should be expressed and made manifest, until which time such moneys do not become due and payable, and therefore extra interest allowed to plaintiff by the mortgage, after such moneys become due, can be collected only from the time when such option is exercised.

Department 2. Appeal from the superior court of Merced county.
J. N. S. Goodfellow and *E. Jackson*, for appellant.

J. K. Law, for respondent.

THORNTON, J. This cause was instituted for the foreclosure of a mortgage made to secure a note. It is contended by the appellant (mortgagor) that the court below allowed the plaintiff a greater sum than he was entitled to have. The note was for \$1,250, and payable one year after date, with interest at the rate of 1 per cent. per month, payable monthly in advance; and it was agreed, as set forth in the note, that in case default should be made in the payment of any of the interest as stated above, that such installment or payment thus in default shall bear interest from the day of maturity until payment at the rate of 2 per cent. per month, compounding monthly; and at any time during such default the entire unpaid balance of the principal sum should, at the option of the holder of the note, and not otherwise, become due and payable, of which election notice was expressly waived; and the principal sum so due and payable should bear interest thereafter at the rate of 2 per cent. per month, compounding monthly, until paid. By the provisions of the mortgage, on default in paying interest, all the moneys so secured by the mortgage should become due and payable at the option of the mortgagee, and not otherwise. It will thus be seen that, on default, all the moneys secured by the mortgage only became due and payable at the option of the mortgagee, and not otherwise; that is, they did not become due until an option was made by the mortgagee.

It does not appear, from any averment in the complaint or otherwise, that any option was made or manifested in any way by the plaintiff (mortgagee) prior to the commencement of the action. This option must have been exercised and manifested in some way by the plaintiff before it could have effect. It was not intended that this option should rest in the undisclosed intention of the plaintiff, or be made by a mere secret, unmanifested intention in the mind of the mortgagee or holder of the note. The provision by which the plaintiff was relieved from giving notice to the maker of the note of such option was not inserted to enable him to make the moneys secured become due by a secret, unmanifested mental state in the mortgagee. The giving notice of his election was not the only way in which this

election might have been disclosed. He (the plaintiff) might have brought his action to foreclose immediately on default, and this would have been a sufficient election; or, though he was not required to give notice of such election, he might, notwithstanding, have given such notice either orally or in writing, and it would have had the effect to make all the moneys referred to due and payable. When the action was commenced, on the ninth of December, 1881, the note by its terms had become due, and then the provision as to the interest on the principal sum compounding monthly did not apply. This provision as to the compounding of the interest on the principal sum was only intended to have operation when, after default in the payment of an installment of interest, and before the principal sum had matured, the plaintiff elected to have the principal become due, so that he might bring his action at once to foreclose. It was entirely unnecessary when the note matured, for, when that day arrived, the principal sum, as well as all other moneys secured, became due, whether the plaintiff so elected or not. The law produced that result, and neither plaintiff nor defendant under the contract could have it otherwise.

As to the interest on interest in default, when default was made in the payment of any monthly installment, it had become due and payable. No election was required to make that so. The plaintiff, under the contract, had a right to have such installment unpaid bear interest. But it cannot be made to bear interest at a rate greater than that borne by the principal debt, (Civil Code, § 1919,) which, in this case, is one per cent. per month. This is the construction placed on section 1919, Civil Code, in *Savings & Loan Soc. v. Horton*, 10 Pac. C. L. J. 778. The section 1918, Civil Code, is limited by section 1919. The latter section applies specifically to agreements to pay interest on interest, and its particular words cannot be controlled by the general language of the preceding section, which refers to a different subject, and can have full application without affecting the provisions of the section which follows it.

The counsel fees should, by the contract, have been allowed at the rate of 10 per cent. on the amount found to be due by the mortgagor to the plaintiff. The court allowed more interest than should have been, and, as it thus found and decreed a sum larger than should have been allowed, the allowance for counsel fees was greater than agreed on in the mortgage.

The appellant asks only for a modification of the judgment appealed from.

The cause is therefore remanded to the court below, with directions to modify its judgment in accordance with what is laid down in this opinion, as of the date the judgment appealed from was entered; and, when thus modified and entered, the judgment will stand affirmed.

We concur: SHARPSTEIN, J.; MYRICK, J.

65 Cal. 406

DURFEE v. GARVEY. (No. 9,225.)

Filed July 19, 1884.

DEED—DEFECTIVE ACKNOWLEDGMENT.

Where the acknowledgment of a deed is fatally defective, no title passes, and a subsequent proper acknowledgment, after a conveyance to another party, will not cure the defective acknowledgment.

Department 2. Appeal from the superior court of Los Angeles county.

This was a suit to quiet the title of plaintiff to certain land, under a conveyance to him by a married woman. Defendant claimed under a subsequent conveyance from the same woman. The plaintiff, it appears, subsequently to the conveyance to defendant, procured the said married woman to execute another acknowledgment of the deed to him. The court found that the first conveyance was defective, in that the married woman executed the deed in the ordinary manner of a single woman, and that the certificate of acknowledgment does not show that she was examined separate from her husband, as required by statute; that the subsequent conveyance to defendant was therefore valid and passed title; that a subsequent proper execution and acknowledgment of the first deed did not cure the defect therein. Plaintiff appealed.

Brunson & Wells, for appellant.

T. H. Howard and Smith, Brown & Hutton, for respondents.

BY THE COURT. The certificate of acknowledgment of Maria E. Espinosa, dated July 26, 1877, was fatally defective, and the deed conveyed no title. The evidence given on the trial of the case does not show that the acknowledgment was other than as certified by the officer. Her proper acknowledgment of the deed, subsequent to her conveyance to the defendant, did not cure the defective acknowledgment. The court found that Garvey made no representation to said Maria for the purpose of deceiving her, and that she was not deceived.

We see no error.

Judgment and order affirmed.

65 Cal. 383

HAY v. HILL. (No. 9,456.)

Filed July 18, 1884.

MORTGAGE—TAXES PAID BY MORTGAGOR.

On a mortgage which was executed prior to the adoption of the present constitution, but due thereafter, the mortgagee must credit the mortgagor with the amount of taxes paid by the latter.

Department 1. Appeal from the superior court of San Diego county.

Luce & Cushing, for appellant.

Leach & Parker, for respondent.

BY THE COURT. In his statement of the case appellant informs us it is the desire of both parties that the appeal be decided on the main question involved, waiving all defects in pleading, findings, or otherwise. If, after the adoption of the present constitution, plaintiff, the mortgagee, became primarily liable for the taxes upon his interest in the property mortgaged, and such taxes were in fact paid by the defendant, mortgagor, the former would have been liable to the latter for the sum so paid, in an action for money paid, laid out, and expended to and for his use and benefit,—this, independently of any constitutional or statutory provision authorizing him to set off such sum. Waiving all defects of form, defendant was justified in claiming the sums paid by him for plaintiff's taxes as payments upon the mortgage debt. There was no contract between the mortgagor and mortgagee by which the former agreed to pay the taxes upon the mortgaged premises, the obligation of which was impaired by the provisions of the new constitution. It is said that to hold the mortgagor is to be allowed the sum by him paid for taxes assessed against mortgagee, is to relieve him from the payment of a part of the money which he agreed to pay. But a power superior to both has relieved the mortgagor of a part of the taxes he was previously bound to pay, and has imposed upon mortgagee a tax upon property previously not taxable. The mortgagor never owed the mortgagee any money for taxes. Under the former system he owed the *state* the taxes assessed upon the whole valuation of the property; under the present system he owes the state, primarily, the tax upon the value of the property, less the mortgage debt, and the mortgagee owes the tax levied on the mortgage interest. The mortgagor having paid an amount due from the mortgagee to the third party,—the state,—is entitled to recover the amount so paid. *McCoppin v. McCartney*, 60 Cal. 371.

Judgment affirmed.

65 Cal. 378

In re Estate of DUNNE. (No. 7,943.)

Filed July 18, 1884.

ESTATES OF DECEDENTS—ALLOWANCE OF LEGACY.

The court in which the administration of a decedent's estate is pending has power to allow to a legatee a portion of his legacy under section 1661, Code Civil Proc., though the funds in the hands of the executors are no more than the amount which may be allowed to them as commissioners under section 1618, Code Civil Proc.

Department 1. Appeal from the superior court of Santa Clara county.

Wm. Matthews, for appellant.

McKisick & Rankin, for respondent.

BY THE COURT. The decision of this appeal must depend upon the answer to be given to the question: Is it error for the court in which the administration of a decedent's estate is pending, to allow to a *legatee* a portion of his legacy, under section 1661 of the Code of Civil Procedure, when the funds in the hands of the executors are no more than the amount which may be allowed to them, as commissions, under section 1618?

It is contended by the executors now here, that, by section 1646, they have the absolute right to retain throughout the administration of any moneys which may come to their hands, beyond the amount necessary to pay funeral expenses, etc., and other *debts*, sufficient to meet the full amount of commissions or fees (basing the estimate upon the *prima facie* valuation of the inventory) to which they may be entitled. Logically the claim is broader, and includes a right to retain their commissions as against an order to pay any *debt*, other than for funeral expenses, etc. Section 1646 reads:

"The executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses, and expenses of the last sickness, and the allowance made to the family of the decedent. He may retain in his hands the necessary expenses of administration, but he is not obliged to pay any other debt or any legacy until, as prescribed in this article, the payment has been ordered by the court."

Section 1618, and the other sections to which reference is made herein, are found in a chapter which treats of *accounts*. The provision that, no compensation being provided by the will, the executor "must be allowed" commissions at a certain rate, is a direction to the court to allow him, at some accounting, commissions at the proper rate. So section 1616 directs: "He," the executor or administrator, "shall be *allowed* all necessary expenses in the care, management, and settlement of the estate, including reasonable fees paid to attorneys for conducting the necessary proceedings or suits in court, and for his services such fees as provided in this chapter," etc.

As we have seen, section 1646 of the Code of Civil Procedure is part of a chapter which treats of *accounts*. It can be given scope

and effect by holding that, at an appropriate accounting, the executor or administrator shall be allowed credits for moneys by him paid for funeral expenses, expenses of the last sickness, and allowance made to the family of deceased, although no previous order has been made directing him to pay such moneys; that he shall also have credit for the amount of his commissions, when the time arrives for accounting with respect to them, but that he shall not have authority to pay, nor be allowed at any accounting, any other debt or any legacy, unless the court has expressly ordered the same to be paid. The language of the section does not necessarily prohibit *the court* from directing the payment of a debt or of a legacy out of any moneys in the hands of the executor or administrator. If, when an order for the payment of a legacy may be made, it shall appear that, after the payment of the legacy, there will not be sufficient assets to pay the expenses, debts, and commissions, and to satisfy the devisees and other legatees, the order may be held to be an erroneous exercise of the discretionary jurisdiction of the court. But, in the case at bar, it was made plainly to appear there was ample estate to pay the sum ordered to be paid upon the legacy, and also the commissions of the executors, after satisfying all claims, and all the devisees and legatees. It is said the executors may be compelled to resort to a sale of real estate to secure their commissions. Even if this were so, the power of the court to order payment of a legacy is not made dependent upon that circumstance.

The legatee obtaining an order for the payment of his legacy is required to give a bond for the payment of his proportion of the *debts* only. Section 1658. It would seem, however, that the bond is given principally to secure the estate against contested claims, or claims which may come in after the order is made, since the court is directed to order the payment of a legacy only "when it appears that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate." Section 1661. But the court has always before it the *data* from which may be estimated the probable amount of commissions to which the executors or administrators will be entitled, and hence may refuse the order in case it will result in a loss to the executor or administrator, or to the creditors, by reason of the fact that there will not remain of the estate sufficient to pay them, after allowing the commissions of the executor or administrator.

It is the duty of the court to protect the executor or administrator, so that he shall receive his commissions upon the amount of the estate "accounted for by him." Section 1618. But this can be done, as we conceive, without depriving the court of its discretion, prudently employed, to make the order for the payment of a legacy, even although the *actual money* in the hands of the executor or administrator may be no more than the amount of his commissions.

Judgment affirmed.

65 Cal. 376

HARRISON v. SPRING VALLEY H. G. CO. (No. 9,495.)

Filed July 18, 1884.

1. PRACTICE AND PROCEDURE—INSTRUCTIONS.

A party cannot object to an instruction given at his request.

2. SAME—CONTRADICTORY INSTRUCTIONS.

Where instructions to a jury are contradictory, the judgment will be reversed.

Department 1. Appeal from the superior court of Butte county.
Reardon & Frier, for appellant.

Burt, Turner & Hamilton, for respondent.

BY THE COURT. The action is for damages done to a growing crop of wheat and barley, by reason of the banks of a canal of defendant, carrying water charged with mining *debris*, giving way or breaking.

At the request of defendant the court below charged the jury: "The measure of damage is the difference between the value of the growing crop at the time of the injury, and its value immediately afterwards, with interest." Whether this is or is not an accurate statement of the legal rule, it was given at the request of defendant, and it cannot object to it now. Assuming the rule to be as stated by the court at the request of defendant, it was reasonable and just that the value of the crop at the time it was injured should be ascertained with reference to what would have been the value of the matured grain had the injury not been done, less certain expenses. As said by the court below, this was one mode of ascertaining the value at the time of the injury.

2. There were averments in the complaint to the effect, and some evidence tending to prove, that defendant permitted more water to flow in the canal than it could safely carry. The charge in that regard was not erroneous.

3. As part of its general charge the court instructed the jury:

"You are instructed that the measure of damages in this case, if you find the plaintiff has been damaged by the negligence of the defendant, will be the difference between the value of the crop of wheat as it then stood, as part of the realty, at the time of the injury, and immediately succeeding its injury, with legal interest up to the rendition of the verdict. *In other words*, if you find a verdict for the plaintiff, you will ascertain from the evidence what the crop of wheat was worth at the time it was *injured* or destroyed, if you find it was *injured* or destroyed, and give legal interest *on that amount* up to the time of rendering your verdict."

Defendant excepted to all of the last paragraph, commencing "in other words," and down to (and including) the word "verdict." The portion of the instruction excepted to was stated by the court to be an equivalent of the first sentence. But an instruction that the verdict should be for the value of the crop at the time it was injured, with interest, is not substantially the same thing as an instruction that the verdict should be for the difference between the values immedi-

ately before and after the injury, with interest on that difference. The distinction between the first and last sentences of the instruction is radical,—they are contradictory.

It is urged that the charge is to be read as a whole, and it is not necessary that a distinct instruction, much less a separated sentence, shall include all the qualifications or limitations upon the general rule laid down in it which the law requires, provided it appears the jury were given such qualifications or limitations elsewhere. But the cases cited in support of this proposition do not apply to the present case. Here two separate and irreconcilable rules for the conduct of the jury in fixing an amount of damages were given by the court. The contradictory rules were not harmonized by the declaration of the court that the one meant the same thing as the other.

Judgment and order reversed, and cause remanded for a new trial.

2 Cal. Unrep. 342

WILLIAMS *v.* BENICIA WATER CO. (No. 9,416.)

Filed July 18, 1884.

APPEAL—BILL OF EXCEPTIONS—MOTION FOR NEW TRIAL.

In the absence of a bill of exceptions, the order denying defendant's motion for a new trial will not be reviewed on appeal.

Department 2. Appeal from the superior court of Solano county.

L. B. & L. Mizner, for appellant.

Jos. McKenna and *Jos. F. Wendell*, for respondent.

BY THE COURT. In the absence of a bill of exceptions we cannot review the order denying the defendant's motion for a new trial, and the appellant does not insist that the complaint does not state facts sufficient to constitute a cause of action, or that the findings do not support the judgment.

Judgment and order affirmed.

65 Cal. 386

BERNERG *v.* CERTAIN INSURANCE COMPANIES. (No. 9,243.)

Filed July 18, 1884.

1. FIRE INSURANCE—POLICY ISSUED BY SEVERAL COMPANIES—AGENCY—NOTICE OF LOSS.

While the defendants, several insurance companies, by executing a single policy in which the liability of each is distinctly set forth, which policy was executed for both defendants by the same general agent, and countersigned by the local agent of both, assumed a several liability, yet an allegation that notice of loss under such policy was duly given to defendants, by service on

such general agent, though the notice was only addressed to one of defendants, is a sufficient allegation of such matter.

2. PLEADING—ACTION AGAINST GENERAL OBLIGORS.

Where a number of persons are severally liable on the same obligation or instrument, it is optional with the plaintiff to include them or not in the same action.

3. SAME—DEMURRER—MISJOINDER OF CAUSES OF ACTION.

It is not a ground of demurrer that two causes of action are improperly united in one count.

Department 2. Appeal from the superior court of Los Angeles county.

A. M. Stephens, for appellant.

Smith & Hupp, for respondent.

BY THE COURT. The grounds on which it is insisted that the demurrer to the complaint should have been sustained are (1) that it does not state facts sufficient to constitute a cause of action; and (2) that there is a misjoinder of parties defendant.

In support of the first ground it is urged there is no allegation that notice of the loss was given to the defendants. The allegation is that soon after the fire occurred the plaintiff served on the agent of the defendants an instrument in writing, of which a copy is annexed to the complaint and marked Exhibit A. By reference to that exhibit it will be seen that, among other things, it states that on December 24–25, 1883, the building insured was destroyed by accidental fire. It was addressed to only one of the defendants. But the allegation is that it was delivered to the agent of the defendants. The defendants, while assuming a several liability, did so by executing a single policy in which the liability of each is distinctly set forth. The same general agent executed the policy for both defendants, and it is countersigned by a local agent of both of them. It was to the latter that the exhibit to which we have referred was delivered. This, in our opinion, constituted a substantial compliance with the law.

As to the other ground of demurrer—the misjoinder of parties defendant—it is only necessary to say that the defendants were “severally liable upon the same obligation or instrument,” and it was optional with the plaintiff to include them or not in the same action. Code Civil Proc. 383; *Powell v. Powell*, 48 Cal. 234; Pom. Rem. § 306.

As we read the complaint it states but one cause of action, and it is not made a ground of demurrer that “two causes are improperly united in one count,” although that point is raised in defendants’ brief.

Judgment affirmed.

65 Cal. 381

PEOPLE *ex rel.* WILLIAMS *v.* HORSLEY and others. (No. 9,497.)

Filed July 18, 1884.

1. TOLL-ROADS—JURISDICTION OF SUPREME COURT.

The supreme court has appellate jurisdiction of a case involving the alleged right of defendants to possess lands claimed to constitute a toll-road, as against all who shall not pay toll for passing over them.

2. SAME—SUPERVISORS OF AMADOR COUNTY—ACT OF 1877.

The act to authorize the board of supervisors of Amador county to declare a toll-road, etc., (St. Cal. 1877-78, p. 693,) simply grants the franchise to the county to collect tolls on the road, and does not purport to authorize the county to grant any franchise to other persons.

Department 1. Appeal from the superior court of Amador county.
Eagan & Armstrong, for appellant.

Gray & Reed and *S. W. Griffith*, for respondent.

BY THE COURT. The defendants were adjudged guilty of usurping a franchise.

1. The respondent insists this court has no jurisdiction to review the judgment; but as the case involves the alleged right of defendants to possess the lands claimed to constitute a toll-road, as against all who shall not pay toll for passing over them, we think the judgment appealable. Const. art. 6, § 5.

2. Defendants claim to have acquired a franchise from the board of supervisors to collect tolls, and that the board was empowered to grant the franchise by the act of April 1, 1878, entitled "An act to authorize the board of supervisors of Amador county to declare that portion of the Amador and Nevada wagon-road which lies in Amador county a toll-road." St. 1877-78, p. 963. The act is in the words following:

"Section 1. The board of supervisors of Amador county are hereby authorized to declare that portion of the Amador and Nevada wagon-road which lies in Amador county a toll-road, to keep the same in repair, to adopt and make rules governing the travel thereover, and to fix the rate of tolls thereon: provided, that the supervisors of said county shall have the right to declare said road a 'free road' at any time, and all improvements that may be or that have been made on said road shall revert for the benefit of the county of Amador, without costs to said county.

"Sec. 2. The tolls on said road shall not exceed the rates heretofore fixed by the board of supervisors of said county.

"Sec. 3. All acts and parts of acts in conflict herewith are hereby repealed."

If it be conceded that the act is constitutional, and that it has not been repealed, (St. and Amdts. to the Codes, 1883, p. 20, § 21,) it simply grants the franchise to the county to collect tolls on the road, and does not purport to authorize the county to grant any franchise to other persons.

Judgment affirmed.

65 Cal. 397

ROBERTS v. HALEY. (No. 9,477.)

Filed July 18, 1884.

TRUST—PARTNERSHIP—CONVEYANCE TO PARTNER.

Where plaintiff and defendant, partners as attorneys, contracted to and did perform professional services, and defendant, in consideration thereof, and without authority from plaintiff, received from the client a conveyance to himself of a tract of land, a court of equity will make him a trustee of plaintiff as to his interest in the property so conveyed, and will compel a conveyance to plaintiff of what he is entitled to have.

Department 2. Appeal from the superior court of Los Angeles county.

T. H. Howard, Bucknell & White, and S. Haley, for appellant.

Smith & Hupp, W. S. Stephenson, Brunson & Wells, and J. G. Howard, for respondent.

THORNTON, J. The complaint is sufficient in its statement of facts to constitute a cause of action.

The court rendered the following decision:

"(1) On the second day of November, 1880, plaintiff and defendant were attorneys and counselors at law, admitted to practice as such. On that day they were, by a written document for that purpose made, employed by Aurelio W. Sepulveda, Raymond D. Sepulveda, and Rudicinda F. Sepulveda, in any and all suits that were then or might thereafter exist, in the courts of this state, in the matter of the Rancho Palos Verdes, and to bring suits. At that time there was pending in the proper court an action for partition of said rancho, entitled *Bixby et al. v. Bent et al.*, and the said Sepulvedas were parties defendants thereto.

"(2) In pursuance of said written employment plaintiff and defendant rendered services as attorneys at law in said action, by reason of which services said Sepulvedas prevailed in the final determination of said suit, and the decree in said action of partition; and said Sepulvedas thereupon became oblants claimed by them were partitioned, allotted, and set apart to them by final ligated to pay to said attorneys a reasonable compensation for such services.

"(3) On the fifteenth day of November, 1882, while plaintiff was absent from the state of California, the defendant procured from said Sepulvedas a deed of conveyance, conveying to him, the said Haley, the lands described in paragraph 5 of the complaint herein, and which lands were a part of the lands saved and allotted to said Sepulvedas in the said partition suit of *Bixby et al. v. Bent et al.*

"(4) At the time of the execution and delivery to defendant of said deed, and contemporaneously therewith, said defendant executed and delivered to Sepulvedas a written document, in words and figures as follows, to-wit:

" 'LOS ANGELES, November 11, 1882.

" 'I have received from Aurelio, Ramon, and Rudicinda Sepulveda full pay and satisfaction for services, under contract of 1876, to defend their interests to one-fifth of Rancho Palos Verdes against the claim of Santiago Johnson, heirs and assigns, in the partition suit of *Bixby et al. v. Bent et al.*, and the conducting partition suit. I have to pay the attorneys that I employed to assist me, to-wit, F. H. Howard, successor of Howard, Brousseau & Howard, and Eastman, Haley, King & Roberts. Eastman, being attorney of record for plaintiffs, is to have no part in the matter, and his name to the complaint of *Sepulveda v. Sepulveda*, a bill in equity to force the legal title out of Jose

L. and Juan Sepulveda. I have also surrendered a claim of two hundred dollars, cash advanced in costs, etc., and acknowledged full satisfaction of all claims and demands held or claimed by me, and by the firm of Eastman, Haley, King & Robarts, or F. H. Howard, and I hereby agree to save said parties to whom I give this receipt harmless from all claims which said Robarts may have or urge against them, or either of them, in or about the litigation above referred to.

SALISBURY HALEY.'

"(5) At the date of said written employment of plaintiff and defendant, to-wit, November 2, 1880, all former agreements between the said Sepulvedas and their attorneys, including defendant, were annulled and set aside, and said written retainer constituted the only contract under which the litigation of *Bixby et al. v. Bent et al.* was thereafter conducted by plaintiff and defendant, and said deed was executed by the said Sepulvedas and received by said Haley in full satisfaction for all services rendered under and in pursuance of said retainer of plaintiff and defendant, and the land so conveyed was then, and now is, of the value of fourteen thousand nine hundred and seventy-nine dollars.

"(6) Since the execution of said deed the defendant has received rents and profits from said lands of the value \$300, all of which he has appropriated to his own use.

"(7) Plaintiff, before the commencement of this action, demanded of defendant a conveyance to him of an equal undivided one-half of the said land deeded to him as aforesaid, and defendant refused to comply with said demand.

"(8) There was never any understanding between plaintiff and defendant, or between the parties hereto and the said Sepulvedas, that either demand of plaintiff or defendant should be settled by the said Sepulvedas separately, or that plaintiff was to be paid independent of the compensation demanded or received by defendant.

"(9) During the pendency of the said partition suit of *Bixby et al. v. Bent et al.*, defendant laid out and expended, for and on behalf of said Sepulvedas, in procuring evidence, and for other purposes, two hundred dollars and no more.

"(10) F. H. Howard, an attorney at law, was employed to assist the parties hereto in the management and trial of said action, and did so assist, and for which services Haley paid him the sum \$1,200, which sum was a reasonable compensation for his services rendered.

"(11) On the third day of November, 1880, the law firm of Eastman, Haley, King & Robarts, of which firm the parties hereto were members, commenced a separate action for said Sepulvedas in the superior court of Los Angeles county against Juan and Jose Loreto Sepulveda, then co-defendants in said partition suit, which said action of *Sepulveda et al. v. Sepulveda et al.* was subsequently, by order of the court, consolidated with *Bixby et al. v. Bent et al.*, and tried at the same time. In that action of *Sepulveda v. Sepulveda*, J. G. Eastman was not entitled to any fee or compensation by reason of having before been an attorney of record for plaintiff in said partition suit, and no compensation was ever paid to him by reason of said action. On the trial of said new action of *Sepulveda v. Sepulveda*, so consolidated with *Bixby et al. v. Bent et al.*, plaintiff and defendant rendered services to said Sepulvedas under and in pursuance of their former written retainer of November 2, 1880, and neither of them received any compensation therefor, except as made by the said conveyance of Sepulvedas to Haley, of November 15, 1882, and their services so rendered were a part of the consideration for the execution of said deed. That the said A. J. King agreed to receive \$400 in full for his services in said new action of *Sepulveda v. Sepulveda*, for the payment of which sum defendant has become personally liable.

"(12) The written authorization and retainer of November 2, 1880, was drawn up and written by the defendant himself, and was not in violation of any understanding had with the law firm of Eastman, Haley, King & Roberts, and the contents of said writing was fully known to defendant before signing.

"(13) That the conveyance by the defendant to the wife of plaintiff, of certain property set up in the answer, was a separate matter, entirely distinct and unconnected with any of the transactions relating to the Sepulveda litigation, or any matter growing out of the same, and for said conveyance Haley received full, adequate, and valuable consideration, and the same was not in satisfaction of any claim or demand of plaintiff of or in or concerning the litigation relative to the Rancho Los Palos Verdes, or the partition thereof."

As conclusions of law the court finds:

"(1) That defendant holds said lands conveyed to him, November 15, 1882, by the Sepulvedas, one undivided half in his own right, and one undivided one-half in trust for plaintiff.

"(2) That he is chargeable with the sum of \$300, received by him as rents and profits.

"(3) That he is entitled to contribution from plaintiff for one-half of the money hereinbefore found to have been paid out by him, stated as follows:

To F. H. Howard,	-	-	-	-	-	\$1,200
Cash laid out and expended in <i>Bixby v. Bent</i> ,	-	-	-	-	-	200
And assumed by defendant to pay to King,	-	-	-	-	-	400

\$1,800

From this deduct rents received,	-	-	-	-	-	300
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Leaving a balance of - - - - - \$1,500

"That upon the payment of one-half the said sum of \$1,500, that is, of \$750, by plaintiff to defendant, plaintiff is entitled to have and receive of and from defendant a deed of conveyance conveying to him an undivided one-half of all the land described in the deed of conveyance from said Sepulvedas to said Haley, of date November 15, 1882.

"(4) The plaintiff is entitled to his costs."

The findings show that the defendant received the land conveyed to him for plaintiff and himself, for services rendered by them as attorneys. Finding 5. This finding, there being nothing in the facts found showing the contrary, plainly indicates that the land was acquired and held by Haley for the joint benefit of plaintiff and himself. This is in accordance with the averments of the complaint, and the law directs such a construction of the finding. The first conclusion of law so determines the legal rights of the parties.

The defendant's contention, that there is no joinder of interests of plaintiff and himself, is unsustainable under the facts found. The allegations of the complaint set forth a joint interest, and the facts found establish it.

The defendant having received the conveyance for plaintiff and himself, he is bound, in good conscience, to transfer to plaintiff his interest. A court of equity will fasten this obligation upon the con-

science of defendant, make him a trustee for this purpose, and compel him to do what he should do; that is, convey to plaintiff what he is entitled to have. This land here was purchased by professional services rendered by plaintiff and defendant under a contract made with them. The conveyance having been made to the defendant under these circumstances, a trust results to the plaintiff by operation of law. *Shoemaker v. Smith*, 11 Humph. 81; Civil Code, §§ 1572, 1573. It is no answer to this that Haley, having acted without authority in procuring the conveyance, as far as regards plaintiff's interest, that plaintiff has still recourse to the parties with whom the contract was made. He has also recourse against defendant. He can elect to proceed against either.

If any issues are not found upon, such issues are immaterial, in view of the facts found. The facts found sustain the judgment, and there was and is no necessity to go further and find on other issues.

There is no contradiction in the findings, and we find nothing to sustain the contention that the defendant is entitled to a judgment upon the pleadings and findings, or upon either pleadings or findings.

Judgment affirmed.

We concur: SHARPSTEIN, J.; MYRICK, J.

65 Cal. 409

CALIFORNIA SOUTHERN R. CO. v. SOUTHERN PAC. R. CO. (No. 8,958.)

Filed July 19, 1884.

RAILROAD COMPANY—CONDEMNATION OF LANDS—PROCEEDINGS, WHERE BROUGHT.

Actions to condemn lands for railroad purposes must be brought in the superior court of the county in which the land is situated. Code Civil Proc. § 1243. On further authority of *California Southern R. Co. v. Southern Pac. R. Co.*, ante, 344, judgment affirmed.

Department 2. Appeal from the superior court of San Bernardino county.

A. B. Hotchkiss, for appellant.

E. Cooper and Byron Waters, for respondent.

BY THE COURT. This action was brought to condemn land for the use of a railroad. The defendant demanded a change of venue on the ground that its principal place of business was in the city and county of San Francisco, and that the action should have been there commenced. The court denied the motion. Sufficient authority for the order of the court is found in section 1243, Code Civil Proc., which declares that actions of this character must be brought in the superior court of the county in which the property is situated. The real estate sought to be condemned is in San Bernardino county; therefore,

that was the proper county for the commencement of the action and for its trial. For this reason, and also for the reasons given in *California Southern R. Co. v. Southern Pac. R. Co.*, ante, 344, the order is affirmed.

(65 Cal. 407)

In re Estate of HIGGINS. (No. 9,493.)

Filed July 19, 1884.

HUSBAND AND WIFE—COMMUNITY PROPERTY.

Property consisting of accumulations after the marriage, which were the result of the ordinary use of the property by decedent, which he owned at the time of his marriage, is not community property.

Department 2. Appeal from the superior court of Stanislaus county.

B. E. Canfield, for appellant.

Paul R. Wright, for respondent.

MYRICK, J. The widow of deceased petitioned the court below to set apart a homestead to her own use, absolutely, out of the real estate, averring that the said real estate was community property of herself and her said husband. The father and mother of deceased (he leaving no issue) contested the petition, averring that the property was the separate property of the deceased. The court found, as conclusion of law, the property to be separate property of deceased, and refused to set apart a homestead except for a limited period. From this order the widow appealed.

The facts as to the property are as follows: The said Frank G. Higgins and the petitioner, then residents of Illinois, intermarried in that state in February, 1880. At that time he was the owner of a farm in Illinois, and of stock and farming utensils thereon, and other personal property. From the time of the marriage they resided on the farm, and he tilled and cultivated the same, and raised live-stock thereon, and purchased live-stock, which he raised and fattened with the products raised by him on the farm, and from time to time sold portions of such live-stock, and of the products raised by him on said farm. Subsequent to the marriage he expended large sums of money in the construction of a dwelling and other buildings and improvements on the farm. In November, 1882, decedent sold the said farm and personal property, with the buildings and improvements, and the increase and profits of said property, and of the labor and industry of decedent, and converted the same into money, and removed to this state, and purchased, and out of said money paid for, the real property mentioned in the petition herein.

The findings of the court below state the law of Illinois regarding the right of the widow to share in the property of her deceased hus-

band; but it is not necessary, for the purposes of this appeal, to consider the law of that state, as it relates to heirship, and does not appear to have the distinction, as between separate and community property, appearing in the laws of this state. It is sufficient to say that it does not appear, even where measured by the law of this state, that the real estate mentioned in the petition was community property. It does not appear what part, if any, of the purchase money was the product of the labor or industry of the decedent after the marriage. It does not appear (the case being here on the findings and order) that the petitioner offered to show what portion, if any, of the purchase money was earned by her husband during the coverture. On the contrary, it would seem from the findings that all the accumulations after the marriage were the result of the ordinary use by him of the property which he owned at the time of his marriage with the petitioner.

Order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

2 Cal. Unrep. 326

GRINDLEY v. SANTA CRUZ Co. (No. 8,170.)

Filed June 18, 1884.

COUNTY SUPERVISORS—CONTRACT WITH PHYSICIAN—DISCHARGE.

In an action by a physician to recover damages for breach of contract made with him by the supervisors of a county, *held*, that defendant was not, on the facts recited in opinion, justified in discharging plaintiff previous to the expiration of the time for which he had been employed to perform the service.

Department 2. Appeal from the superior court of Santa Cruz county.

F. I. McCann, for appellant.

W. D. Storey and *Z. N. Goldsby*, for respondent.

THORNTON, J. Action by a physician to recover damages for breach of contract made with him by the supervisors of Santa Cruz county.

The court rendered the following decision:

"(1) That on the sixth day of October, 1879, the defendant employed plaintiff as county physician for the period of one year thereafter from that date, and to pay him therefor monthly the sum of \$37.

"(2) That, at the time of said contract, the plaintiff was a regularly graduated physician and surgeon, holding a diploma, authorizing him to practice medicine and surgery, from the Jefferson Medical College, of the state of Pennsylvania, dated on the fifteenth of March, A. D. 1865.

"(3) That, at the time of said contract, the plaintiff held a certificate from the Medical Society of the State of California, showing his right and authorizing him to practice medicine and surgery in any part of this state.

"(4) That the board of supervisors of the defendant, at the time of entering into the contract, personally handled and examined both the diploma of

the plaintiff and his certificate to practice medicine and surgery in this state.

"(5) Plaintiff, on the third day of January A. D. 1879, filed with the recorder of said county, and caused to be recorded, his said certificate to practice medicine and surgery in this state.

"(6) Under the contract aforesaid, the plaintiff on the same day, the sixth of October, 1879, entered upon the performance of his duties, and attended to all the indigent sick persons of said county, and attended daily at the hospital of said county, between the hours of 9 o'clock and 11 o'clock A. M. of each day, up to the eighteenth day of January, 1880, when, and on which day, the steward of the said hospital, by order of the board of supervisors of defendant, prevented the plaintiff from visiting the sick wards of said hospital, or from attending upon the indigent sick persons of said county.

"(7) On the eighteenth day of January, A. D. 1880, the defendant prevented the plaintiff from completing or from further continuing the contract, or performing his part to be performed under it.

"(8) The duties of the plaintiff under the said contract consisted in visiting the indigent sick of said county, and prescribing such treatment, medicines, and attention as might be necessary.

"(9) It was the practice of plaintiff to go to the office of the said hospital in the forenoon of each day, generally about 10 o'clock, and attend to such patients as applied to him at said office for treatment, and that he did not go into the wards of said hospital, or seek the patients, to ascertain if they needed treatment; that some of said patients were confined to their wards, and were unable to go to said office; that this mode of treatment was not a compliance with the duties of said plaintiff as county physician.

"(10) No rules or regulations have ever been made by defendant's board of supervisors for the hospital or jail of said county, or for the guidance or direction of plaintiff.

"(11) The plaintiff, at the time of entering into the contract, was engaged in the practice of medicine and surgery in the said county of Santa Cruz, and the performance of the contract with defendant subjected him to no additional expense.

"(12) Very soon after the entry by plaintiff upon the discharge of his said duties, a contest arose between himself and said steward in regard to their respective powers and duties,—the plaintiff claiming general authority over said hospital, and the regulation and supervision of the conduct, diet, and exercise of the patients, and that in all respects he had assumed full and exclusive management of the said hospital; that the board of supervisors of said county, after an investigation of the said matters, did, on the seventeenth day of January, 1880, by an order on the minutes of said board, discharge the plaintiff from further attendance upon the indigent sick persons of said county, residents therein, and remove him from said position of county physician.

"(13) That the plaintiff, on the thirty-first day of January, 1880, made out, in writing, a claim against the defendant for his services under said contract, in the usual form of accounts against said county, stating therein the items of his claim, and made oath thereto before the clerk of said county that the same was correct, and that no part thereof had been paid or allowed; that the amount named in said account was fully due; and that the same had not been theretofore presented to or rejected by said board; which oath was subscribed by plaintiff and certified by said clerk, in writing, upon said account, and delivered the said account so verified to the clerk of said board of supervisors, and the same was filed and presented to said board, and by it considered and disallowed on the third day of February, 1880.

"(14) No opportunity has, up to this time, been presented to plaintiff to engage in the same kind of service, or duties to be performed by him under said contract.

"(15) Plaintiff has been, since his discharge, ready and willing to continue and complete the duties on his part to be performed under said contract, and is still ready and willing to complete the same.

"(16) On the third day of February, 1880, the board of supervisors of defendant, by an order regularly made upon their minutes, appointed another and different person to the duties, for the unexpired term of one year, to-wit, until the sixth day of October, 1881, which the plaintiff had contracted to perform, and was, as aforesaid, prevented from performing.

"(17) The amount of money to which plaintiff would be entitled on the completion of his contract, and yet unpaid to him, is the sum of three hundred and thirty-three (\$333) dollars.

"(18) The amount of damage suffered, and necessarily to be suffered, by plaintiff, by reason of the action of the defendant in preventing the completion of said contract, is the sum of three hundred and thirty-three dollars."

CONCLUSIONS OF LAW.

"That the interests of the indigent sick of said county in said hospital demanded the removal of said plaintiff from the position of physician of said hospital, and that the board of supervisors of said county, in the removal of said plaintiff from said position, was in the exercise of a lawful authority of said board, exercised in a lawful manner. Let judgment be entered for defendant for its costs in this action."

The contract of plaintiff and defendant was a valid contract. If plaintiff performed the duties required of him by the contract, and incumbent upon him as physician of the hospital, the defendant had no right to discharge him during the period embraced in it. The findings in relation to the plaintiff's performance are not clear. It is not distinctly found that he did not perform such duties. The sixth finding states that he did perform them. The finding (ninth) that he did not go into the wards of the hospital, seek the patients there confined, who were unable to go to the office, where it was his practice to meet them and prescribe for them, is not clearly inconsistent with the finding that he did perform the duties required of him, for it does not appear by the facts found that his attendance on them in the wards was necessary. It may have been that it was not necessary. Though these patients were confined to the wards, it might not have been requisite that he should have gone there. They may not have required his attendance at all; and this might have been well known to the plaintiff. These findings, however, are not clear and definite.

For what reason the defendant discharged the plaintiff does not appear. We cannot perceive, as a matter of law, that the controversy between plaintiff and the steward of the hospital justified the board of supervisors in discharging him. The plaintiff may have been in the right in this matter. Nothing is found from which we can infer in law that the claim made by plaintiff was not just and proper. The facts should have been found from which the court might be able to draw the legal conclusion that plaintiff was in the wrong, and was acting outside of the line of his duty. It does not appear from the finding (twelfth) that plaintiff did anything beyond making a

claim as to the extent of his powers. This may have arisen from an honest error of judgment on his part. It does not appear that he performed any act beyond what he was authorized as physician of the hospital, or that he exceeded his authority in any way. This controversy, we think, might have been adjusted by the board of supervisors, and the scope, extent, and limits of the authority of the contending officers defined by the board. The claim of authority by the plaintiff might have been honestly made, and we cannot see how such claim, honestly made, should have subjected him to be discharged by the board from its employment under the contract, and prevented by it from the performance of its requirements. No sufficient reason is given for such discharge and prevention in the findings or conclusions of law. The general reasons given for such discharge or removal, in the conclusions of law, are not sufficient. The ground on which such discharge, removal, and prevention was made should have been especially found, so that the court could perceive, as a matter of law, that such action of the board was justified by law. It must be remembered that the plaintiff was in the discharge of his duties under a lawful contract for a specific period, and as long as he complied with his contract, and with the law governing his relations to the county as its employe and contractee, the board had no authority to discharge or remove him from his position, or prevent him from performing the duties incumbent on him.

According to the eighteenth finding, the plaintiff had suffered damage by reason of the action of defendant in the sum of \$333; yet the judgment is for defendant, and costs are adjudged to it. This is a *non sequitur*. We cannot see that such a judgment can be rendered while this finding stands.

We find no other error in the record injurious to the plaintiff.

The judgment must be reversed, and, owing to the ambiguity and indefiniteness of the findings, the cause will be remanded for a new trial, to be had in accordance with the views herein expressed.

We concur: SHARPSTEIN, J.; MYRICK, J.

65 Cal. 403

PFISTER and others v. DASCEY and others. (No. 8,043.)

Filed July 18, 1884.

1. PLEADING—MISJOINDER OF DEFENDANTS—FRAUDULENT CONVEYANCE.

It is no misjoinder of parties defendant, in an action to set aside a conveyance fraudulent as to creditors, to make the assignee in insolvency of the fraudulent grantor a party.

2. SAME—AVERMENTS—DEMURRER.

Where plaintiffs aver, as to certain defendants, that they are informed and believe that such defendants claim some interest in the premises, such is not

the averment of a cause of action against them, and other defendants cannot object by demurrer as to misjoinder of parties for including such defendants.

3. SAME—COMMON DESIGN TO DEFRAUD—UNITING CAUSES OF ACTION.

Where the matters complained of relate to the same property, are parts of the same transaction, and of one design to defraud, and affect all the parties defendant, an action to set aside a conveyance as fraudulent, and to recover possession of the land conveyed, may be united.

4. PRACTICE—JURY TRIAL—WAIVER.

By failure to ask for a jury trial it is waived.

Department 2. Appeal from the superior court of Santa Clara county.

Moore, Laine & Johnston, for appellants.

Burt & Pfister, for respondents.

THORNTON, J. This action was brought by plaintiffs, claiming, as purchasers and owners of a parcel of land, by virtue of a sale on execution issued on a judgment regularly recovered against defendant John Dascey, to set aside certain conveyances executed by said Dascey, and by others claiming under him, as fraudulent and void against the plaintiffs, as creditors and purchasers, and to recover possession of the parcel of land above mentioned. The complaint was demurred to by defendants John Dascey, Teresa Dascey, John W. Smith, and John McCallum, on the following grounds:

"(1) That the same does not state facts sufficient to constitute a cause of action against these defendants, or either of them.

"(2) That there is a misjoinder of parties defendant in this: that John McCallum, N. R. Harris, assignee of the estate of John Dascey, an insolvent, Max Greenburg, Alex. Peers, and Henry Walters, August Walters, and Charles S. Fecheimer, doing business as copartners under the style and firm name of 'Walters & Fecheimer,' John Doe and Richard Roe, and each and all of them, are joined as defendants in this action.

"(3) That three causes of action—to-wit, an action to annul and set aside as fraudulent certain conveyances from John Dascey, one of the defendants herein; an action under section 738 of the Code of Civil Procedure of this state, to determine adverse claims to the real property described in said complaint; and an action of ejectment, to recover possession of said land, with the rents and profits thereof—have been improperly united and joined in one statement, without being separately set forth as distinct causes of action.

"(4) That said amended complaint is ambiguous, unintelligible, and uncertain, in this: that it cannot be told therefrom with reasonable certainty whether the action is brought to set aside certain conveyances from the defendant John Dascey, in said complaint mentioned, or is an action under section 738 of the Code of Civil Procedure of this state to determine an adverse claim to the property therein described, or is ejectment to recover possession, and rents and profits, of said property.

"(5) That plaintiffs have not legal capacity to sue."

The demurrer was overruled.

It is urged that the demurrer should have been sustained on the grounds numbered two, (2,) three, (3,) and four, (4.)

As to misjoinder of defendants, we think Harris, the assignee in

insolvency of John Dascey, was not improperly joined as a defendant. The averments as to the other defendants, Max Greenburg, etc., state no cause of action against them. The averment is not that they claim some interest in the premises, but that the plaintiffs are informed and believed that they do. This is no statement of any cause of action against them. With this ground, however, the demurrants had no concern. But as all these parties disclaimed any and all right or claim in the land in suit, which was acted upon by the court and accepted by plaintiffs, we do not think the judgment should be reversed, if they were originally improperly joined as defendants. There was no misjoinder of causes of action. As against the real defendants, John Dascey, John McCallum, John W. Smith, and Teresa Dascey, the only parties who defended the action, there was no such misjoinder. All of the matters complained of related to the same property, were parts of one transaction and one design to defraud, and affected all the parties who defended the action. Under these circumstances, we see no reason why an action to set aside the conveyances averred to be fraudulent, and to recover possession of the land to which such conveyances related, should not be prosecuted in the same action. This is certainly permissible under our system. Resort has been frequently had to such procedure in cases of mines, where an action to enjoin the working of the mines and to recover possession of them have been joined. *Wilson v. Castro*, 31 Cal. 428; *Bigelow v. Gove*, 7 Cal. 133; *Weaver v. Conger*, 10 Cal. 233; *Moore v. Massina*, 32 Cal. 595; *N. C. & S. C. Co. v. Kidd*, 37 Cal. 282; *Ord v. Steamer Uncle Sam*, 13 Cal. 369; *Smith v. Richmond*, 15 Cal. 502; *Jones v. Steam-ship Cortes*, 17 Cal. 487; *Oakland v. Carpentier*, 13 Cal. 552.

In *Boone v. Chiles*, 10 Pet. 177, 231, the same relief was asked for and granted, as was asked for in this case.

Under a system of procedure, as in England, where legal and equitable remedies were administered in different tribunals, it was allowable to seek the aid of equity as ancillary to a suit at law; as to set aside a fraudulent conveyance in aid of an action of ejectment or a writ of entry. *Ward v. Chamberlain*, 2 Black, 445. Our system permits such remedies to be administered in the same forum; and a party aggrieved is not turned out of one court to obtain complete redress in another. In this regard our system is to be preferred.

Perhaps, as to the action to recover possession, the defendants may have been entitled to a jury trial. But this they did not ask for, and by not asking for it, it was waived.

The causes of action were separately stated. The complaint was sufficient in this respect. As to this there was no confusion.

If it was sought in this action to have an adverse claim determined, it only applied to the defendants whose disclaimers were accepted and acted on by the court. As far as regards the other defendants,

a demand for such relief may be treated as surplusage, and, no doubt, was so treated by the court below.

The other grounds of demurrer are not sustainable.

The judgment must be affirmed, and it is so ordered.

We concur: SHARPSTEIN, J.; MYRICK, J.

65 Cal. 425

MOUND CITY LAND & WATER ASS'N v. SLAUSON and others. (No. 9,200.)

Filed July 22, 1884.

CONVEYANCE—CONSIDERATION.

An agreement by defendants to protect the plaintiff against any personal judgment on a contract of guaranty, in an action brought against plaintiff and others by a banking corporation, is a sufficient consideration for a conveyance executed by plaintiffs to defendants.

In bank. Appeal from the superior court of Los Angeles county. *Bicknell & White and Graves & Chapman*, for appellant.

J. F. Godfrey and R. M. Widney, for respondent.

THORNTON, J. The conveyance made by plaintiff to Slauson was on sufficient consideration, to-wit, that Slauson would prevent the recovery of, or protect plaintiff against any personal judgment on, a certain contract of purchase in the action brought by the Los Angeles County Bank against Wolfskill, plaintiff, and others. This Slauson agreed to do. On this agreement the conveyance was executed. A promise for a promise is a sufficient consideration. 1 Pars. Cont. 373. The promise on the part of plaintiff was to make a conveyance, if Slauson would agree to protect it, and the promise on the part of Slauson was to protect it in consideration of the conveyance. It may be remarked that this promise by Slauson appears to have been complied with, for in the action the bank failed to recover a personal judgment against the plaintiff. In this view it makes no difference that plaintiff was not bound on the guaranty which, it was claimed, subjected it to a personal judgment in the suit of the bank. Slauson agreed to protect it from any judgment against it in that suit. Whether it was bound or not by the guaranty was the very question to be determined in that suit, and Slauson undertook to defend the suit and defeat the claim against plaintiff; or, if he could not defeat the action and judgment passed against it, to protect it against such judgment.

It is said that the contract of guaranty was *ultra vires*, and therefore did not bind the corporation. But the bank in its action was claiming that this contract was not *ultra vires*; that it bound plain-

tiff, and was seeking to make it liable in the suit and have judgment against it. Whether Slauson knew or thought the contract bound plaintiff or not does not appear; but it makes no difference whether he thought or knew it did not. He may have acted on the view of the law that it did not bind plaintiff, but this was the very point in judicature, and we see no reason why, if he was clear and positive in his opinion that plaintiff was not bound, that he could not contract as he did. He bore no relation of trust or confidence to the plaintiff which bound him to take care of its interests. He was not its guardian, agent, director, or trustee. The parties dealt at arms-length, untrammelled by any confidential or fiduciary relations. The fact that Slauson was, at the time the contract was made, the president of the board of directors of the Los Angeles County Bank, cuts no figure in the matter. His holding that position did not render his contract illegal. The transaction is not claimed or alleged to have been in any way fraudulent, except as to the inducement to the members of plaintiff's board of directors to sanction the contract with and conveyance to Slauson, viz., that it was made to protect themselves against personal liability as stockholders of the plaintiff corporation. This motive was not alleged to have been known to Slauson, or that he acted on it. Conceding that this motive on the part of the directors would have made the conveyance fraudulent, as Slauson knew of no such motive, he could not have acted on it, and he was guilty of no fraud.

The same reasoning applies if the contract of guaranty made by the plaintiff was without consideration. Slauson's contract may have induced, and no doubt did induce, him to defend the action, and he had a right to defend on both grounds, that plaintiff's contract was without consideration and *ultra vires*, or on either. Slauson did not contract that plaintiff's contract was *ultra vires* and without consideration, and therefore of no force, but that he would prevent a judgment against plaintiff, or, if recovered, would protect plaintiff from it. At any rate, the outcome was that plaintiff succeeded in the action.

Whatever title the bank acquired to the lands involved herein was obtained by a fair purchase under a fair sale in the foreclosure suit. If it purchased in this mode the San Jose rancho and the San Jose addition, (that it purchased does not clearly appear,) there was a redemption from the purchase of these lands by Wolfskill. As to the Azusa rancho there was no redemption, and for this property a sheriff's deed was made to it after the lapse of the proper period, and it (the bank) subsequently conveyed this rancho to defendant Philip H. Martz. These sales to and purchases by the bank are not assailed in any way as unfair. If they were unfair, redress should have been sought by a motion to the court in which the judgment of foreclosure was rendered, to have them vacated.

We find no averment in the complaint of any circumstances which vested in plaintiff herein any equity by which to charge the bank as

its trustee. The grantee of the bank, Philip H. Martz, stands in its place, and occupies a position equally as favorable. There is nothing to justify fastening a trust on Martz, either as the grantee of the bank or of Slauson. We will add here that there is no charge of a combination or collusion by Slauson with the directors, who, as a board, authorized the conveyance to him, to defraud the corporation or its stockholders, and no facts averred which show any such combination or collusion. Nor is it alleged that Slauson was the bank in another guise, the latter seeking through him, as its instrument or intermediary, to secure an inequitable advantage of the plaintiff or its stockholders.

We think the judgment should be affirmed, and it is so ordered.

We concur: SHARPSTEIN, J.; ROSS, J.; MCKINSTRY, J.; MYRICK, J.

65 Cal. 421

BROOKS v. HASLAM. (No. 9,469.)

Filed July 22, 1884.

PLEADING—NEW MATTER IN AVOIDANCE—BURDEN OF PROOF.

The statement by defendant in his answer of any new matter in avoidance of plaintiff's action is deemed controverted by the opposite party, (Code Civil Proc. 462,) and the burden of proving an issue raised thereby is on the defendant.

Department 2. Appeal from the superior court of Tuolumne county.

Caleb Dorsey, for appellant.

E. A. Rodgers, for respondent.

SHARPSTEIN, J. The defendant's denial of the allegation that he "willfully, unlawfully, wrongfully, and maliciously" shot the plaintiff's husband, standing by itself, raised no issue, because the shooting, if not justifiable or excusable, was "willful," etc. And of this the pleader appears to have been aware, for the denial is followed by an averment "that said shooting was done purely in self-defense." This amounts simply to a plea in confession and avoidance, and the principles of pleading, before the Code, required that matter in confession and avoidance should be *speciallly pleaded*, and not given in evidence under the general issue. 1 Chit. Pl. 552. If to such a plea there was a replication, the burden of proving the affirmative of the issue devolved on the defendant. Under the Code, the statement of any new matter in the answer, in avoidance, must be deemed controverted by the opposite party. Code Civil Proc. 462. Here the averment in the answer, that the shooting was done in self-defense, was controverted—put it issue—by the plaintiff, and it devolved on the defendant to prove the affirmative of that issue. But the court nonsuited the plaintiff because she did not prove that it was not done in self-defense. This was shifting the burden from the side on which the law cast it to the opposite side.

Judgment and order reversed.

We concur: THORNTON, J.; MYRICK, J.

MANOR *v.* DAVIS. (No. 9,283.)

Filed July 22, 1884.

PRACTICE—JUDGMENT—EVIDENCE.

Evidence *held* to sustain the judgment.

Department 2. Appeal from the superior court of Colusa county.

H. M. Alberry, for appellant.*Geo. A. Blanchard* and *T. J. Hart*, for respondent.

BY THE COURT. The only point made in this case is that the evidence is insufficient to sustain the decision of the court. We have examined the evidence and think it is.

Judgment and order affirmed.

SUPREME COURT OF CALIFORNIA.

(65 Cal. 411)

KERNS v. McKEAN. (No. 8,040.)

Filed July 22, 1884.

1. CONTRACT FOR SALE OF LAND—FORFEITURE—WAIVER—DEATH OF PARTY.

Where, by the terms of a written contract for the sale of land, A. (from whom plaintiff claims) was authorized, on default in the payment of principal or interest by B., (under whom defendant claims,) to declare the contract forfeited and ended, by depositing written notice to that effect in the county recorder's office, and immediately thereupon he should be at liberty and have the right to re-enter into free and full possession of the premises, and be restored to his former estate therein; and, said default occurring, A. did file the notice as allowed by the agreement: *held*, that A. thereby became entitled to the right of possession of the land and the recovery thereof. No waiver would arise by delay in filing the notice, indulgence, or non-action, and the death of B. prior to filing of such notice with the recorder did not change the rights of the parties, nor in such case was it necessary for A. to present any claim against the estate of B. to his administrator.

2. PRACTICE—FINDINGS—NEW TRIAL.

Where findings are contradictory, new trial will be granted.

Department 2. Appeal from the superior court of Santa Cruz county.

C. B. Younger, for appellant.

J. A. Barham, for respondent.

THORNTON, J. Action to recover possession of a parcel of land situated in the county of Santa Cruz. The defenses set up do not invoke any equity for defendant's protection. They are purely legal, and go to the plaintiff's claim to recover on his legal right to the possession. No equity to a specific performance of the contract, referred to in the findings, between Patterson and Sanford is put forth in the answer, therefore the cases cited for respondent are not applicable.

The court rendered the following decision:

"*First.* On and before the twenty-fifth day of October, 1867, W. H. Patterson was the owner of the premises described in plaintiff's complaint, holding the same by regular mesne conveyances from the heirs of Jose Amesti, a claimant of a grant from the Mexican government, which was in due form confirmed and patented to the heirs of said Amesti by the United States authorities.

"*Second.* That while said Patterson was so the owner of said premises, and on the twenty-fifth day of October, 1867, he made, entered into, and executed an agreement in writing with one A. P. Sanford, by the terms and conditions of which the said Sanford agreed to pay said Patterson the sum of \$3,336 at the time and in the manner following, to-wit: October 25, 1867, \$500; October 25, 1868, \$709; October 25, 1869, \$709; October 25, 1870, \$709; October 25, 1871, \$709,—together with interest on said sums unpaid from October 25, 1867, at 10 per cent. per annum, with like interest on all sums unpaid; the interest, if not paid, to be compounded from month to month.

It was also provided in said agreement that Sanford should keep all the taxes of every kind laid, imposed, or assessed thereon, or which might *prima facie* appear to be laid, imposed, or assessed thereon, paid.

"*Third.* In consideration of these payments thus to be made, Patterson agreed and covenanted to execute to Sanford, upon the full payment of said several sums, a conveyance to the tract in question. It was further provided that in the event default should be made in the payment of any of said installments, either of principal or interest, or the payment of any taxes when the same became due, or should appear to be due, that the whole principal and interest should be due at the election of said Patterson, and that said Patterson might declare said agreement, and all the rights of said Sanford thereunder, forfeited and ended, by depositing written notice that he declares the same forfeited, in the office of the county recorder of Santa Cruz county, and immediately thereupon said Patterson should be at liberty and have the right to re-enter into the free and full possession of said premises, and should be restored to his former estate therein, and remove all persons therefrom, and all payments thereto made thereon by Sanford should be retained as the compensation and equivalent for the use of said premises prior to said forfeiture. It was further provided in said agreement that said Sanford should take immediate possession of said premises and hold possession thereof until default should be made in some one of the covenants and agreements contained, to be kept and performed by said Sanford. That said agreement was executed in duplicate, one of which was delivered to Sanford, the other to said Patterson. Said agreement, as attached to defendant's answer, is hereby referred to and made a part of this finding.

"*Fourth.* Under this agreement, Sanford entered the possession and the occupation of said premises, and remained in the possession thereof until his death, September 4, 1874.

"*Fifth.* That said Sanford made the following payments, and no other, on said contract: October 25, 1867, by exchange of land, \$500; December 19, 1868, by cash, \$500; May 20, 1871, by cash, \$200. That said Patterson never at any time took steps to enforce the collection of the payments in arrears on said contract, or to declare a forfeiture of the same, until September 17, 1875, after the death of Sanford, and that the notice mentioned in the sixth finding herein was filed with the county recorder, without any previous demand or notice to said administrator; that said Patterson never demanded from said administrator the payment of any arrears of purchase money due on said contract.

"*Sixth.* Upon the seventeenth day of September, 1875, Patterson filed in the office of the county recorder of Santa Cruz county a notice in writing, declaring the agreement with Sanford forfeited and ended, upon the grounds that neither the installments of principal or interest had been paid as provided for in said agreement.

"*Seventh.* That on the fourth day of September, 1874, Sanford died intestate, at the county of Santa Cruz. At the time of his death he was a resident of the county of Santa Cruz. That one P. F. Dean, on or about the sixth day of September, 1874, filed his petition in the probate court of said Santa Cruz county, praying an order of said court appointing him administrator of the estate of A. P. Sanford, deceased; that such proceedings were afterwards had and taken in said court upon said petition that upon the eighteenth day of September, 1874, said court duly made and entered its order and decree appointing said Dean administrator of said estate of Sanford, deceased; that Dean duly qualified as such, and letters of administration, on or about the day last above named, issued to him; that he thereupon entered upon his duties as such administrator, ever since has been and still is the duly appointed, qualified, and acting administrator of said estate.

"*Eighth.* That on or about the eighteenth day of September, 1874, said

Dean, as administrator of the estate of A. P. Sanford, deceased, entered into and took possession of the premises described in plaintiff's complaint, and remained in the possession thereof in person and through his tenants until the first day of November, 187—, when he let and hired the same to this defendant for the term of one year from that date; that on said last-named day defendant, as tenant of Dean, under the lease, took possession of said premises, and was in possession thereof when this action was commenced.

"*Ninth.* That such proceedings were had and taken in said estate in the probate court of Santa Cruz county on or about the ——— day of ———, 187—, the said court duly made and entered its order and decree in the matter of said estate, showing and decreeing that due notice to the creditors of said estate had, before that date, been duly given and made by the administrator of said estate; that the first publication of said notice was made on the ninth day of October, 1874.

"*Tenth.* That neither Patterson nor plaintiff ever, at any time, presented any claim against said estate to said administrator.

"*Eleventh.* That on the thirteenth day of December, 1876, said William H. Patterson executed to plaintiff a warranty deed of said premises.

"*Twelfth.* That while defendant was so in the possession of said premises, and before this suit was commenced, plaintiff demanded of defendant the possession of said premises, which was refused. That plaintiff has never been permitted to enter into the possession of said premises.

"*Thirteenth.* That the value of the use and occupation of said premises is \$600 per annum.

"*Fourteenth.* That on the twentieth day of May, 1876, plaintiff commenced his action against said P. F. Dean *et al.* in the district court of the Twentieth judicial district of the state of California, in and for Santa Cruz county, to recover the possession of said premises, and that said action is still pending and undetermined.

"*Fifteenth.* That said A. P. Sanford, from and after about January 1, 1873, was in the open, notorious, and exclusive possession and occupation of said premises, claiming the same adverse to the whole world.

"*Sixteenth.* That on or before the commencement of this action plaintiff had full knowledge and notice of the possession and occupation of said premises by Sanford and Dean, and of the character of defendant's occupation thereof.

"*Seventeenth.* That W. W. Stow was, at the date of the contract between Patterson and Sanford, duly authorized and empowered by Patterson to execute same on behalf of Patterson and in his name."

By the terms of the contract as found, on default by Sanford (under whom defendant claims) in payment of principal or interest, Patterson, from whom plaintiff derails title, was authorized to declare the contract forfeited and ended by depositing written notice to that effect in the office of the county recorder of Santa Cruz county, and immediately thereupon he should be at liberty and have the right to re-enter into free and full possession of the premises, and be restored to his former estate therein, etc. The default occurred, and Patterson filed the notice as allowed by the agreement. This gave Patterson a right to the possession of the land, and he was entitled to recover it. We find no act of waiver of this right by Patterson. Delay in filing this notice was not a waiver. Indulgence or non-action is not a waiver of such right. *Gray v. Blanchard*, 8 Pick. 291; *Lawrence v. Gifford*, 17 Pick. 366; *Hutcheson v. McNutt*, 1

Ohio, 15; *Jackson v. Cryslar*, 1 Johns. Cas. 125; *Hunter v. Osterhountd*, 11 Barb. 33; *Phelps v. Illinois Cent. R. Co.* 63 Ill. 468; *Hegler v. Eddy*, 53 Cal. 597. No notice was required from Patterson other than the notice filed. Parties certainly have a right to make their own contracts, when not violative of law. Granting that notice in some form is necessary, certainly the law will not require a notice different from that which the parties have agreed on. We do not perceive that this term of the contract as to notice is altered by the fact of Sanford's death. The contract had in it no such term, and the law does not authorize us to insert it. Patterson had a right to act on such stipulation, with like effect, as well after as before the death of Sanford. Besides, before the action was brought, plaintiff demanded of defendant to be let into possession.

The law did not require Patterson to present any claim against the estate of Sanford to his administrator. He asked nothing against the estate. He was merely claiming his own property. The failure to present such claim was no defense to this action.

The fourteenth finding shows no defense to this action. The two actions were not against the same parties. It does not appear that defendant was a party to the action of plaintiff against "P. F. Dean *et al.*"

The fifteenth finding, as to the adverse possession of Sanford and Dean, and the fourth finding, are contradictory. The latter finding distinctly states as a fact that Sanford entered into possession and occupation of the premises under the agreement with Patterson, and remained in possession thereof until his death, September 4, 1874. That being the case, we cannot see that there was any adverse possession by Sanford. Dean was his administrator, and certainly as such held no possession adverse to Patterson. Sanford having entered into possession under this agreement, there certainly could be no hostile possession by him to Patterson, unless it was clearly manifested to his vender by unequivocal acts. *Unger v. Mooney*, 11 Pac. C. L. J. 574.

On account of the contradiction in the above findings the judgment is reversed, and the cause remanded for a new trial.

We concur: SHARPSTEIN, J.; MYRICK, J.

(66 Cal. xviii)

KERNS v. DEAN. (No. 8,041.)

Filed July 22, 1884.

JUDGMENT REVERSED.

On the authority of *Kerns v. McKean*, ante, 404, judgment reversed, and cause remanded.

Department 2. Appeal from the superior court of Santa Cruz county.

C. B. Younger, for appellant.

J. A. Barham, for respondent.

BY THE COURT. This action depends in the main on the same facts as *Kerns v. McKean*, ante, 404. No defense of the statute of limitations, or of another action pending between the same parties for the same cause, is here set up. The points involved herein are passed on in *Kerns v. McKean*, and determined adversely to the defendant in this cause.

The judgment is reversed and the cause remanded, and the court below is directed to enter judgment for the plaintiff for the possession of the land sued for, and for rents and profits, to be computed from the commencement of defendant's possession, at the rate found, of \$600 per annum.

(65 Cal. 410)

WATROUS v. CUNNINGHAM. (No. 9,214.)

Filed July 22, 1884.

EVIDENCE—REPLEVIN—BOOK-ENTRIES.

In an action against a sheriff for the recovery of certain hogs, a certain book, containing the record of transactions between plaintiff and a third party as to hogs, but not connected by evidence with the hogs, which are the subject of the suit, is inadmissible for the purpose of corroborating the testimony of plaintiff that he was the owner of the hogs. The entries in the book did not bind defendants, and as to them they were *res inter alios acta*.

Department 2. Appeal from the superior court of San Joaquin county.

Campbell & Muenter, for appellant.

Baldwin & Smith and Louttit & Lindley, for respondent.

MYRICK, J. This action is for the recovery of the possession of 60 hogs, alleged by plaintiff to be his property. The hogs had been seized by the defendant Cunningham, as sheriff, by virtue of an attachment at the suit of the defendant McDougald, as the property of one Ho Yuck. On the trial, the question was whether the plaintiff had bought the hogs as and for his own property, or whether he had advanced the money to Ho Yuck, the latter being the purchaser. The plaintiff called one Ling Sing as a witness, who testified that he bought hogs

from Ho Yuck; that sometimes Ho Yuck got the money for them, and sometimes the plaintiff got it; that Ho Yuck always told the witness to pay plaintiff. The plaintiff then offered in evidence the book of Ling Sing showing the account between Ling Sing and plaintiff. This was objected to, and the objection was overruled. The book, being received in evidence, showed the account between Watrous and Ling Sing, where Watrous was credited with hogs and charged with cash. The object of offering the book in evidence was to corroborate the testimony of plaintiff that he was the owner of the hogs. For that purpose it was incompetent. The entries in this book did not bind defendants. As to them they were *res inter alios acta*. The court erred in its ruling admitting them. We cannot say but this evidence, in the minds of the jury, turned the scale in favor of plaintiff.

Judgment and order reversed, and cause remanded for a new trial.

We concur: SHARPSTEIN, J.; THORNTON, J.

65 Cal. 419

NEWBILL v. THURSTON. (No. 9,208.)

Filed July 22, 1884.

1. MINES AND MINING—LOCATION OF CLAIM.

In an action of ejectment, *held*, that plaintiff's location of a mining claim was insufficient.

2. PRACTICE—FINDINGS—EVIDENCE.

Findings *held* not sustained by the evidence.

Department 2. Appeal from the superior court of San Bernardino county.

Satterwhite & Curtis and *P. Reddy*, for appellants.

J. S. Bicknell and *W. A. Harris*, for respondents.

MYRICK, J. Ejectment for a portion of a mining claim. The question is whether the location of the plaintiffs was sufficient to entitle them to recover. On the twenty-sixth of March, 1881, Newbill, one of the plaintiffs, went upon the ground and posted a notice and erected a discovery monument. No other marks or monuments were then made or erected, but the notice stated that the locator claimed 20 days within which to make the boundaries and to record the claim. The ground claimed by the notice extended 500 feet south-easterly and 1,000 feet northerly from the notice. During the ensuing two weeks Newbill went from his camp, some 12 miles distant, to the claim several times. He gives as his reason for not erecting monuments or placing other marks by which the boundaries could be readily traced, that he was ill and not able to perform the necessary labor.

During the time, however, he went to another mining region, and posted notices of location there. On the fifth of April defendants' grantors made a location, properly marked, which embraced a portion of the ground indicated in the Newbill notice. On the tenth or eleventh of April, Newbill made an arrangement with his co-plaintiffs, Wallace, Ferrell, and Parks, by which they were to complete his location for their mutual benefit. Notice was accordingly posted on behalf of said plaintiffs, and monuments erected. The ground claimed by plaintiffs is called the "Red Jacket;" that claimed by defendants is called the "Mammoth." This action is to recover so much of the "Red Jacket" as is within the boundaries of the "Mammoth," and of a claim called the "Tiger."

The court below, after stating the facts, found that from the time of the discovery by Newbill until the marking of the boundaries was finally completed, no unreasonable time elapsed, and there was no unreasonable delay, or any delay, in making or completing the boundary marks or monuments, except such as was necessary and unavoidable. We are of opinion that this finding is not sustained by the evidence, nor does it harmonize with the undisputed acts of the parties. The act of congress authorizing the location of claims does not state any time within which the location must be completed; but it says the claim must be distinctly marked on the ground, so that its boundaries can be readily traced. If a person be on the ground, actually engaged in making the location, it would hardly be asserted that another might locate over him; but the case before us does not present such transactions. Newbill was not on the ground engaged in marking the boundaries of his claim; he was away,—part of the time detained by illness and part of the time engaged in posting notices elsewhere. The location by his co-plaintiffs did not relate back to the original notice, but was an original transaction. The location by defendants' grantors was prior in time, and must prevail.

The location by James of the "Tiger" claim was subsequent to that of the plaintiffs. As James took no appeal, his location is not before us.

The judgment and order as to the defendants Thurston, Dougherty, and the Oriental Mill & Mining Company, and as to so much of the "Mammoth" claim as is within the lines of the "Red Jacket," are reversed, and the cause is remanded for a new trial.

We concur: SHARPSTEIN, J.; THORNTON, J.

2 Cal. Unrep. 344

MILLICH v. GUTTERNICH. (No. 8,169.)

Filed July 24, 1884.

1. PRACTICE—JUDGMENT—FINDINGS.

Judgment *held* not sustained by the findings.

2. SAME—RIGHT TO CONTRADICT WITNESS.

Where evidence of plaintiff is material, it is competent for defendant to contradict him, and refusal to allow him to do so is ground for reversal.

Department 1. Appeal from the superior court of Santa Cruz county.

This was an action under the forcible entry and detainer law, to recover the possession of certain premises, and damages for the withholding thereof. Plaintiff alleged a lease by him to defendant, which lease had expired, and that since the expiration of the lease defendant refused, though duly notified, to deliver possession of the premises to plaintiff.

F. J. McCann, for appellant.

Goldsby & Cloud, for respondent.

BY THE COURT. This action was properly brought under section 1161 of the Code of Civil Procedure, but the judgment of the court below must be reversed for errors in the proceedings.

In the first place, the findings do not support the judgment. No such lease as that set forth in the complaint is found by the court; but, on the contrary, a contract for a lease is found essentially different from the terms of the lease which is declared on, and is the foundation of plaintiff's action.

There was also error in the ruling of the court found in the fourth bill of exceptions. The plaintiff testified that he was not in the city of Santa Cruz on the twenty-third day of January, 1879. This was material evidence in the case, and it was competent for the defendant to contradict him on this point.

For these errors the judgment must be reversed, and the cause remanded for a new trial. So ordered.

65 Cal. 429

GILLESPIE v. WINN. (No. 9,328.)

Filed July 24, 1884.

ESTATES OF DECEDENTS—ACTION FOR MONEY RECEIVED BY DECEDENT.

A claim against the estate of a deceased person, for moneys received by decedent in her life-time, while acting as guardian of plaintiff, must be presented to the administrator for allowance before suit thereon. It is also necessary in such an action to show that the moneys received by intestate as guardian have come into the hands of defendant as administrator, or otherwise.

Department 2. Appeal from the superior court of Sacramento county.

Freeman & Bates, for appellant.

Frank D. Ryan and Hart & White, for respondent.

BY THE COURT. We think the motion for nonsuit was properly granted. The claim on which the action is based was never presented for allowance to the defendant as the administrator of the estate of Mrs. Hersperger, deceased, nor is it shown that the money which she received as the guardian of plaintiff ever came into the hands of defendant as such administrator, or otherwise. On the other hand, the only evidence introduced on the trial tends to prove the exact reverse.

Judgment affirmed.

(2 Cal. Unrep. 345)

Estate of CROZIER. (No. 9,119.)

Filed July 25, 1884.

ESTATES OF DECEDENT—REVOKING PROBATE OF WILL—ALLEGATIONS OF PETITION.

An averment, in a petition for revocation of the probate of a will, "that at the time of signing said supposed will by him the said James Crozier was not of sound and disposing mind," but, on the contrary, said deceased was at said time of unsound mind, is a sufficient averment of the fact that testator was of unsound mind.

Department 2. Appeal from the superior court of San Joaquin county.

Byers & Elliot, Campbell & Muentner, and *W. L. Dudley*, for appellant.

D. S. Terry and Louttit & Lindley, for respondent.

BY THE COURT. The demurrer to the petition for revocation of the probate of the will was properly overruled. The petitioner alleges that one of the grounds on which she asks for such revocation is "that at the time of signing said supposed will by him the said James Crozier was not of sound and disposing mind, but, on the contrary, said deceased was at said time of unsound mind." If this is not an averment that he was of unsound mind, we do not know what would be.

Decree affirmed.

65 Cal. 417

WALTHER v. MUTUAL INS. CO. (No. 9,302.)

Filed July 22, 1884.

1. PRACTICE—FINDINGS—EVIDENCE.

Findings *held* not sustained by the evidence.

2. LIFE INSURANCE POLICY—SUICIDE—ACTION—EVIDENCE.

Where, in a suit on a life insurance policy, conditioned that no policy is payable in case of suicide, papers are put in evidence for the purpose of showing compliance with the requirement of the policy, and such papers on their face show a suicide, they are *prima facie* evidence of that fact, and should be so considered.

Department 2. Appeal from the superior court of Sacramento county.

McAllister & Bergin, for appellant.

Dunlap & Van Fleet, for respondent.

MYRICK, J. This is an action on a policy of insurance on the life of plaintiff's husband. The policy contained the statement that "the company does not insure against self-destruction in any form." It also required proofs of death to be furnished, including statements from attending physicians, a householder, and the undertaker.

On the trial of this case, the plaintiff, after proving the fact of death, offered in evidence, for the sole purpose of showing compliance with the requirement of the policy, preliminary proof of the death of deceased, which had been furnished to the company by the plaintiff, consisting of the proceedings of the coroner's inquest had upon the body of deceased, a statement by the plaintiff, together with statements by attending physicians, the undertaker, and a householder. It appeared from the evidence of the physician, given before the coroner, that the deceased died from the effects of prussic acid. The verdict of the coroner's jury was that the cause of his death was prussic acid administered by his own hand with suicidal intent.

No evidence was offered contradicting the above. The court below found that there was no evidence sufficient to show that the deceased committed suicide, and found that the allegations of the answer that he committed suicide were untrue. This finding was based evidently on the proposition that as the plaintiff offered the papers referred to solely for the purpose of showing that she had complied with the requirements of the policy as to preliminary proof, they would not be considered for any other purpose. This was error. When the papers were in evidence they were before the court, and showed on their face that the deceased had committed suicide; and for the purposes of the trial they were *prima facie* evidence of that fact, and should have been so considered. *Ins. Co. v. Newton*, 22 Wall. 32. Doubtless the plaintiff would have been permitted to overcome, if she could, the presumption raised by the papers, by evidence that the

death was from natural causes; but no proof as to the cause of death was offered, save that above noted.

Judgment and order reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; SHARPSTEIN, J.

2 Cal. Unrep. 247

CALIFORNIA SOUTHERN R. CO. v. COLTON LAND & WATER CO. (No. 9,191.)

Filed July 25, 1884.

JUDGMENT AFFIRMED.

In bank. Appeal from the superior court of San Bernardino county.

J. H. Gibson and *J. A. Bethune*, for appellant.

Byron Waters and *H. E. Cooper*, for respondent.

MYRICK, J. Upon the authority of *California Southern R. Co. v. Kimball*, 61 Cal. 90, the judgment and order are affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.; ROSS, J.

65 Cal. 432

MONTGOMERY v. MERRILL. (No. 9,138.)

Filed July 25, 1884.

MORTGAGE—FORECLOSURE—RECEIVER—CROPS.

Pending foreclosure proceedings, under a mortgage of certain land, together with the rents, issues, and profits thereof, the court is authorized to appoint a receiver to take possession of the mortgaged premises, and harvest and market the crop growing thereon, which had been planted by defendant; the crops in such case would be part of the mortgaged property.

In bank. Appeal from the superior court of Colusa county.

H. M. Albery, for appellant.

J. T. Herrington, for respondent.

SHARPSTEIN, J. It appears that the receiver took possession of the mortgaged premises and harvested and marketed a crop grown thereon, which had been planted by the defendant. At the foreclosure sale the mortgaged premises did not bring a sum sufficient to satisfy the debt secured by the mortgage; and the plaintiff applied to the court for an order that the money realized from the sale of said crop should be applied to the payment of the deficiency. The application was resisted by the defendants, who made a counter-application to have

said money paid to them. The plaintiff's application was denied, and that of the defendants granted. From that order the plaintiff appealed.

This was a case in which the court was authorized to appoint a receiver. Code Civil Proc. 564. According to an allegation of the complaint, which was not denied by the answer, in the action to foreclose the mortgage, not only the land described in the complaint, but the rents, issues, and profits thereof, were mortgaged, so that the crop which the receiver took possession of was a part of the mortgaged property. And it appears that the proceeds of the sale of that, when added to the sum realized from the sale of all the other mortgaged property, was insufficient to satisfy the judgment recovered by the plaintiff. The defendant's insistence, that because the plaintiff omitted to demand a judgment for a deficiency, in case of a failure to realize from a sale of the mortgaged property a sum sufficient to satisfy the judgment, he is not entitled to the money realized from the sale of said crop, is based on what we conceive to be a misapprehension of the case. The deficiency can only be the excess of the mortgage debt, as established by the judgment, over the sum realized from a sale of all the mortgaged property, of which, in this case, the crops constituted a part.

Order appealed from reversed.

We concur: ROSS, J.; THORNTON, J.; MCKINSTRY, J.

65 Cal. 431

WEIDEKIND v. TUOLUMNE CO. WATER CO. (No. 9,535.)

Filed July 25, 1884.

1. DAM—LIABILITY OF OWNER—EVIDENCE—CONVERSATION WITH WITNESS.

Where plaintiff, against defendant's objection, was allowed to testify to a conversation between himself and one Ham, (a witness,) in response to the question, "Did you not state to Randall Ham that you expected him to testify that the dam was in a rotten condition?" *held*, that such evidence was inadmissible for any purpose.

2. SAME—INSTRUCTION.

An instruction which told the jury that the dam was insufficiently and negligently constructed, unless it had gates sufficient to let out the water, so as to prevent any break that occurred below the top of the dam from being enlarged by a continued flow of water through it, is an instruction in respect to matter of fact, and erroneous.

3. SAME—DUTY OF DEFENDANT.

An instruction that "it was the duty of defendant to *constantly* examine said dam during the season of freshets," is an instruction respecting matter of fact, and erroneous.

Department 2. Appeal from the superior court of Tuolumne county.

E. A. Rodgers, for appellant.

Caleb Dorsey, for respondent.

SHARPESTEIN, J. The objection to the plaintiff's testifying to a conversation between himself and the witness Ham should have been sustained. The evidence was inadmissible for any purpose.

We think the court overstepped the limit prescribed by section 19, art. 6, of the constitution when it instructed the jury: "If you find from the evidence that the defendant did not have sufficient gates to let out the water, so as to prevent any break that occurred below the top of the dam from being enlarged by the continual flow of the waters through it, then said dam is insufficiently and negligently constructed. It should have had gates sufficient to let all the water out by degrees, so as to prevent a flood below by a sudden breakage of the dam."

It was proper to instruct the jury as to the degree of care and vigilance which the law devolved on the defendant in the construction and maintenance of its dam, and that if it neglected or failed to exercise that degree of care and vigilance it would be liable for such damages as any one might suffer from the dam's breaking away. But when the court went beyond that, and instructed the jury that the dam was "insufficiently and negligently constructed" unless it had gates sufficient for a certain purpose, it charged with respect to a matter of fact. The court might as well have charged them, that, if the dam was not of certain dimensions or constructed of a particular kind of material, it was insufficiently and negligently constructed. The defendant had a right to have the opinion of the jury on those questions.

And we think the court erred in charging that "it was the duty of the defendant to *constantly* examine said dam during the season of freshets." That might depend on circumstances, and should have been left to the jury.

There was no error in refusing to give the first and in modifying the third instruction which the defendant requested to have given.

Judgment and order reversed.

We concur: THORNTON, J.; MYRICK, J.

(2 Cal. Unrep. 346)

NUNAN *v.* SUPERIOR COURT. (No. 9,513.)

Filed July 26, 1884.

CERTIORARI--REVIEW.

Where the superior court has jurisdiction over the subject-matter and the party, an application for a writ of *certiorari* or review will be denied.

Department 2. Application for a writ of *certiorari* or review, to review an order committing the petitioner for contempt, for failing to

pay over moneys alleged to have been received by him as sheriff to plaintiff's attorney in the court below. The petition showed that the order to pay was made on notice to the petitioner.

M. C. Hassett, for petitioner.

W. R. Daingerfield, for respondent.

By THE COURT. Application for writ of review. The superior court had jurisdiction over the subject-matter and the party.

Application denied.

PEOPLE v. GREENLAW. (No. 9,536.)

Filed July 26, 1884.

JUDGMENT AND ORDER AFFIRMED.

Staude v. Election Com'rs, 10 Pac. C. L. J. 29, followed.

Department 2. Appeal from the superior court of Sacramento county.

The facts and questions involved in this case are the same as those in *Staude v. Election Com'rs*, 10 Pac. C. L. J. 29.

Hart & White and *Jones & Martin*, for appellant.

J. T. Carey and *Freeman & Bates*, for respondent.

By THE COURT. Upon the authority of *Staude v. Election Com'rs*, 10 Pac. C. L. J. 29, the judgment and order appealed from are affirmed.

2 Cal. Unrep. 347

HEINLEN v. CENTERVILLE & KINGSBURY IRRIGATION DITCH CO.
(No. 8,700.)

Filed July 26, 1884.

PRACTICE—SETTING ASIDE DEFAULT—ACCIDENT AND SURPRISE.

Where defendant answers, but, failing to appear at the trial, judgment was rendered for plaintiff, there was no abuse of discretion on the part of the court below in granting defendants' motion to vacate the judgment and award a new trial, on the grounds of accident and surprise.

Department 1. Appeal from the superior court of Tulare county.

In this cause defendant answered, but, having failed to appear at the trial, the court, after proofs taken, rendered judgment for plaintiff. Subsequently, defendant moved to vacate such judgment, and for a new trial, on the ground of accident and surprise, in that defendant never received or had notice of the fact that the cause had been set for trial, which motion was granted. From this order plaintiff appealed.

v.4,no.9—27

Atwell & Bradley and C. A. Heinlen, for appellant.

S. C. Poage and W. A. Tupper, for respondent.

By THE COURT. There was no abuse of discretion on the part of the court below in granting defendant's motion to vacate the judgment and award the defendant a trial.

Order affirmed.

(2 Cal. Unrep. 346)

THOMPSON and others v. SPRAY. (No. 9,496.)¹

Filed July 26, 1884.

1. PRACTICE—DEFENDANT SEEKING AFFIRMATIVE RELIEF—DISMISSAL BY PLAINTIFF.

Where defendant in his answer sought affirmative relief, an attempted dismissal of the action by plaintiffs, on the day before the case was to be called for trial, was a nullity.

2. SAME—SETTING CASE FOR TRIAL—JUDGMENT IN ABSENCE OF PLAINTIFF.

A case having been regularly set for trial, of which plaintiffs had notice, it was their duty to have attended at the time appointed, and a judgment in their absence is not error.

Department 1. Appeal from the superior court of Amador county.

This cause having been set for trial and being regularly called on the day set, and the plaintiffs not appearing, defendant proceeded with his case. Thereupon the court rendered judgment for defendant. Plaintiffs appealed. The other facts appear in the opinion.

Egan & Armstrong, for appellants.

A. Caminetti, for respondent.

By THE COURT. Defendant, in his answer, having sought affirmative relief, the attempted dismissal of the action by the plaintiffs, the day before the case was to be called for trial, was a nullity. Code Proc. § 581. The case having been regularly set for trial, of which plaintiffs had notice, it was their duty to have attended at the time appointed.

Order affirmed.

(65 Cal. 437)

BANK OF STOCKTON v. JONES. (No. 8,300.)

Filed July 26, 1884.

PROMISSORY NOTE—ASSIGNMENT AFTER MATURITY—PAYMENT.

Payment of a note to the payees before notice of assignment of the note, is a defense to an action by the assignee who took the note after maturity.

Department 1. Appeal from the superior court of San Joaquin county.

¹ Reversed in banc. See 5 Pac. 506, 66 Cal. 350.

Stanton L. Carter and Byers & Elliot, for appellant.

F. T. Baldin and J. C. Campbell, for respondent.

Ross, J. There was testimony tending to show that the note the defendant executed to Owens & Moore was by that firm assigned, after maturity, to the plaintiff, as collateral security for the payment of a note of Owens & Moore, and of certain over-drafts of theirs. Subsequently, another member was admitted into the firm of Owens & Moore, after which the firm transacted its business under the name of Owens, Moore & Co. The over-draft account with the plaintiff was, as expressed by the cashier of the plaintiff, "continued right along under the name of Owens, Moore & Co.," and the note of Owens & Moore, for which the note of the defendant was in part held as collateral, was taken up, and a note of Owens, Moore & Co. substituted in its place. Subsequently, and without any notice of the assignment of his note, the defendant paid the full amount due upon it to Owens, Moore & Co. Williams, the book-keeper for Owens & Moore, as well as for Owens, Moore & Co., testified:

"I took the money to the bank (plaintiff) and paid \$1,000 of it to the bank, and directed it to be credited on this note in suit, which the bank then held, and the balance of \$1,080 I deposited in the bank to the credit of Owens, Moore & Co., on open account, and afterwards drew the money out on checks. The \$1,000 was credited on the note as I directed."

The present action is upon the note, notwithstanding defendant's payment. The jury was justified in finding that the payment by defendant was to Owens & Moore, the payees of the note; and having been made to them before notice of the assignment to the plaintiff, defendant is protected by virtue of section 368 of the Code of Procedure, which reads:

"In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defense existing at the time of or before notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith and upon good consideration, before maturity."

Judgment affirmed.

We concur: MCKINSTRY, J.; MCKEE, J.

ADVERSE POSSESSION—ACTION FOR PARTITION—FINDINGS.

In an action for partition, the findings of the lower court that defendant had entered under color of title, and had acquired sole ownership by adverse possession, *held* sustained by the evidence.

Department 1. Appeal from the superior court of Colusa county.

H. M. Albery, for appellant.

W. C. Belcher and Stabler & Bayne, for respondent.

MYRICK, J. This is an action for partition, commenced by plaintiff's testator in his life-time, he claiming that he and the defendant were the owners, as tenants in common, of the premises described. The defendant denied the alleged ownership of plaintiff, and averred title in himself; the defendant also pleaded the statute of limitations, viz., sections 321 and 322, and subdivision 2 of section 323, Code Civil Proc.

The court, after stating the source of title, and the conveyances under and through which the parties, respectively, claimed, found that the defendant, on the twenty-fifth day of September, 1862, entered into and upon, and took the actual and exclusive possession and occupation of, the said land and premises in question, under a claim of title exclusive of every other right, and in good faith founded such claim upon a written instrument as being a conveyance of the said land and premises, and the whole thereof, and claimed to own and hold the same and every part thereof as his own exclusively, and thereafter maintained and held the actual, open, notorious, peaceable, exclusive, continuous, and adverse possession and occupation until 1865, when he conveyed one parcel to Treadway, who entered and held in the same manner until 1866, when he reconveyed the parcel to defendant, who has since and still has and maintains possession as before. We are of opinion that the findings are sustained by the evidence. The defendant entered under a deed from Whitcomb; Whitcomb claimed under a deed from Misroom, who, in fact, owned the undivided one-half; the *habendum* clause of which deed is, "to have and to hold all and singular the above-mentioned and described premises unto" the grantee. Whitcomb also had a deed from Larkin, who had been joint owner with Misroom, which contained a clause of warranty against his (Larkin's) acts. The defendant, entering and holding under the deed from Whitcomb, is clearly within section 322, Code Civil Proc., even though Larkin may have conveyed his interest before his deed above noted to Whitcomb; he "entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument as being a conveyance of the property in question."

We see no error in the record prejudicial to the plaintiff.
Judgment and order affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

SPECT v. HAGAR. (No. 9,408.)

Filed July 26, 1884.

FINDINGS SUSTAINED BY THE EVIDENCE.

Department 2. Appeal from the superior court of Colusa county. The facts in this case are the same as in *Spect v. Hagar*, ante, 419, and the findings of the court are the same as in that case.

H. M. Albery, for appellant.

W. C. Belcher and Stabler & Bayne, for respondent.

By THE COURT. Ejectment. Defense, the statute of limitations. The findings are full in favor of defendants, and are sustained by the evidence.

We see no error in the record.

Judgment and order affirmed.

65 Cal. 445

PEOPLE v. McFADDEN. (No. 10,950.)

Filed July 26, 1884.

1. CRIMINAL LAW AND PROCEDURE—ASSAULT TO MURDER—VERDICT.

On an indictment for assault to murder, the verdict, "We, the jury, find defendant guilty of an assault to murder," is not limited to the assault merely, and is a sufficient verdict.

2. SAME—CAUSE OF DEATH—QUESTION FOR JURY.

Whether a shot would or would not have produced death, under certain circumstances, is a question for the jury.

3. SAME—STATEMENT TO JURY.

Where the bill of exceptions shows that there was no question as to certain matters stated by the court as facts, such a statement to the jury was not error prejudicial to the defendant.

In bank. Appeal from the superior court of Sacramento county.

W. K. Boucher and *E. A. Rodgers*, for appellant.

The Attorney General, for respondent.

MYRICK, J. 1. The indictment charged that the defendant was guilty "of the crime of an assault to murder, committed as follows." Then follows a statement that he unlawfully, feloniously, and with malice aforethought, with a deadly weapon, to-wit, a shot-gun, loaded with powder and shot, upon the body of one Smith made an assault, and did shoot at and wound the said Smith, with the unlawful and felonious intent then and there willfully, and of his malice aforethought, to kill and murder the said Smith.

Objection is made that the indictment does not state any offense greater than a misdemeanor, viz., an assault. We think the in-

dictment, taken together, is sufficient to charge the greater offense.

2. The verdict returned is as follows: "*The People, etc., v. Barney McFadden.* We, the jury, find the defendant guilty of an assault to murder." Signed by the foreman and dated.

Objection is made that the verdict of guilty is limited to the assault merely. We think the verdict sufficient. It would have been more orderly for the court to have instructed the jury to return a verdict in terms as set forth in section 1151, Penal Code; but we think the effect of the language used is substantially sufficient. See section 960, Pen. Code. We do not see that the variation has tended to the prejudice of any substantial right of the defendant upon its merits.

3. It may have been fortunate for the person wounded that the shot penetrated the skin only, and did not, or perhaps would not, ordinarily have produced death at a given range; but we apprehend that such questions are properly left to the jury, to be determined as questions of fact.

4. The court instructed the jury: "In this case, *the assault being admitted*, you must determine from the evidence whether it was committed with the unlawful intent to kill the person assaulted." The defendant complains that the court, in this instruction, assumed that an assault had been committed. The defendant's bill of exceptions states that it appeared from the evidence that the defendant discharged both barrels of his gun at Smith, shooting him in the face and putting out his eye. The bill settled by the judge has also the written approval of the defendant's attorney. Under such circumstances the point is too trivial to require further consideration.

Judgment and order affirmed.

We concur: MCKINSTRY, J.; SHARPSTEIN, J.; THORNTON, J.

65 Cal. 466

WEIR v. VAIL. (No. 8,916.)

Filed July 26, 1884.

1. ACTION ON JUDGMENT OBTAINED IN ANOTHER STATE.

In an action on a judgment obtained in another state, where defendant had an opportunity in the original action to defend before judgment was obtained, and was not prevented from so doing by fraud, he is bound by the judgment.

2. FINDINGS—EVIDENCE.

Findings *held* not sustained by the evidence.

In bank. Appeal from the superior court of Los Angeles county. *Glassell, Smith & Patton*, for appellant.

John T. Godfrey and *F. H. Howard*, for respondent.

MYRICK, J. This is an action brought on a judgment recovered by plaintiff against defendant in the supreme court of the state of New

York. The court below permitted the defendant to go behind that judgment and interpose as a defense matters existing when the action on which the judgment was rendered was brought, and, finding that by fraudulent practices the defendant had been prevented from having the benefit of his defense, enjoined the collection of the judgment. The correctness of such action on the part of the court is the question for consideration.

Weir, Vail, and one White had entered into an agreement with reference to obtaining franchises for the construction and operation of tramways in cities of Great Britain, and under that agreement steps had been taken by the parties without profitable results. The defendant, Vail, claims that at this point Weir and White had abandoned the agreement, and that he had the right to proceed with the enterprises alone. He did proceed, with favorable results, and realized a large sum. The action in the New York court was brought by Weir against Vail to recover his asserted proportion of the amount so realized. White was made a party defendant, he having been a party to the agreement. Summons was served on Vail, May 15, 1872. On that day he had attorneys in New York for his interests, and on the tenth of June, 1872, his answer was filed by them. When the suit was commenced Vail was a resident of England, and was temporarily in New York. He soon left New York, and never again returned there. The answer of Vail set up the failure of Weir to perform the agreement on his part, and that the agreement had been canceled by the parties. This is substantially the defense now interposed, other than alleged fraudulent practices in the procuring of the judgment. Three years after the suit was commenced, viz., May 28, 1875, under a commission issued out of the New York court, the deposition of Vail was taken in London, which was used at the trial. This deposition contained several letters from Weir and White, and Vail's answers to 45 interrogatories. These answers went quite fully into the transactions between the parties, and the proceedings had by them in reference to the subject-matter of the agreement; how fully, as compared with the evidence of Vail on the present trial, need not be considered. Sufficient to say that he was apprised by the suit of the claim made by the plaintiff; he employed attorneys to defend him, his answer was filed, and his deposition was taken and used on the trial. It thus appears that he had the opportunity of being heard, and was heard, so far as he and his attorneys then deemed important. In 1876 the trial in New York was had. At that trial (his attorneys being present) the testimony of Weir and White was taken, and was in conflict with the views of Vail. On the fifth of December, 1876, the court filed its findings and adjudged that Vail was liable to account to plaintiff and White for the moneys received by him, and that a reference be had to ascertain the amounts. On the fourth of August, 1877, an order of reference was made. On the thirty-first of October, 1879, under a commission issued out of the New York

court, the deposition of Vail was taken in Los Angeles, in this state, (he having removed to that place,) consisting of answers to 25 interrogatories, in which he again went quite fully into the transactions of the parties. This deposition was used before the referee. On the twentieth of March, 1878, the report of the referee was filed, and on the twentieth of October of that year judgment was rendered in favor of the plaintiff and against this defendant for \$78,580.75, and costs. In 1874 the depositions of three witnesses were taken in London, which were used at the trial. During all these proceedings Vail was represented by attorneys in the New York court.

The present action on the judgment was commenced June 17, 1881, and the defendant's answer was filed June 23, 1881. The present defense consists, as before, of an alleged abandonment of the contract, failure to comply with its terms, and cancellation; and, in order to do away with the effect of the former judgment, the answer contains allegations of fraudulent practices on the part of Weir and White, by which the defendant was lulled into security, and prevented from making as complete a defense in the former suit as he otherwise would have made.

From the foregoing facts it will be seen that the former action was pending (with Vail's knowledge) from May 15, 1872, until October 20, 1878, and was, during all that time, (six years and five months,) being defended by him. He was not in New York in person, as he was traveling in Europe, America, and elsewhere for his health; but he was represented by attorneys of his own selection, and had some correspondence with them. Before the judgment he knew that Weir and White had given their evidence, and that it was against him. There is no evidence tending to prove that he could not, if disposed, have offered any defense existing. There is no substantial difference in his testimony as given now and then, except that now it goes more into detail, and also contains exhibits not before presented, including letters of Weir and White, written to him before the commencement of the first suit. We do not think it can be properly said that he was prevented by any fraudulent practice of the plaintiff from making any defense that he then deemed important. He may have been, as he doubtless was, disappointed that the testimony of White was against him. He might well have anticipated that Weir's views of the facts were different from his own; else, why the suit? But as to White, he had full opportunity to know what his evidence was after it was given. It does not appear that before the trial he inquired of White as to the particulars of what his (White's) testimony would be, but relied upon general declarations that "the suit was an outrageous proceeding on the part of Weir;" that he (White) "would be with him," (Vail,) and "if he could do anything for him he would be there." No motion for new trial was made, no appeal was taken, and no surprise manifested until the commencement of this suit. We are of opinion that, if that judgment should have been other than it

is, the misfortune is attributable to the neglect of defendant to take such steps as were within his power to avert the result. A party having had an opportunity of being heard, and having been heard, cannot complain if he did not speak as fully as he might have done.

"Relief will not be granted by staying proceedings at law, after a verdict, if the party applying has been guilty of laches as to the matter of defense, or might, by reasonable diligence, have procured the requisite proofs before the trial. Thus, if a defendant has omitted to file a bill for a discovery of facts known to him, and material to his defense, and suffered the case to go to trial without adequate proof of such facts, he cannot afterwards claim an injunction or a new trial from a court of equity; for it was his own folly not to have prepared himself with such proof, or to have filed a bill for a discovery, and to have procured a stay of the trial until the discovery. So, if the facts on which the bill is founded, although discovered since the trial, might have been established at the trial, upon the cross-examination of a witness, and the party was put upon the inquiry, relief will be refused. So, where a verdict has been obtained at law against a defendant, and he has neglected to apply for a new trial within the time appointed by the rules of the proper court of law, courts of equity will not entertain a bill for an injunction upon an alleged ground that the original demand was unconscientious or the subject-matter of an account, provided it was competent for the party to have laid those grounds before the jury on the trial, or before the court of law, upon the motion for a new trial.

"Indeed, this doctrine is not limited to mere cases decided in the courts of common law, but it is applicable to all cases where the matter of the controversy has been already decided on by another court of competent jurisdiction, even though it be a foreign court, or where it might have been made available in that court, as a matter of claim or defense, in a suit pending in such court. For it has been truly said, not to be the practice of courts of equity to assume jurisdiction in favor of parties who, having had an opportunity of asserting their title in another court, where the matter has been properly the subject of adjudication, have either missed that opportunity, or have not thought proper to bring their title forward." 2 Story, Eq. Jur. §§ 895, 895a; *U. S. v. Throckmorton*, 98 U. S. 61, and cases there cited.

The finding that Vail was prevented by the fraudulent practices of Weir and White from interposing his defense in the New York suit is not sustained by the evidence.

Judgment and order reversed, and cause remanded for a new trial.

We concur: SHARPSTEIN, J.; MCKEE, J.; THORNTON, J.; MCKINSTRY, J.

2 Cal. Unrep. 348

PAYNE v. KRIPP. (No. 9,500.)

Filed July 26, 1884.

EVIDENCE—ACTION FOR PERSONAL INJURIES—ADMISSION OF COUNSEL.

In an action for damages for personal injuries, defendant's counsel on the trial admitted that "the allegations in the complaint in respect to the amount of damages sustained by plaintiff were not denied by the answer," upon which admission the court sustained an objection to questions in relation to the amount of such damages. As a matter of fact the answer did put in issue such allegations, and the questions were therefore proper and admissible.

Department 1. Appeal from the superior court of Yolo county.

B. A. Hudson and *J. C. Ball*, for appellant.

W. B. Treadwell, for respondent.

By THE COURT. Action for damages for a personal injury sustained by the plaintiff at the hands of the defendant. On the trial the plaintiff was asked: "How much, if anything, have you laid out or expended for the services of physicians, and for nursing, by reason of the injury to your jaw here complained of?" The court sustained an objection to this question, and excluded all testimony in relation to that matter, upon an admission made in open court by defendant's counsel "that the allegations of the complaint in respect to the amount of damage sustained by the plaintiff were not denied by the answer." As a matter of fact, the answer did put in issue the allegations of the complaint in respect to the amount of damage sustained by the plaintiff. The question was proper, and should have been answered.

Judgment and order reversed, and cause remanded for a new trial, with leave to the plaintiff to amend his complaint if he shall be so advised.

65 Cal. 447

LYTLE CREEK WATER CO. v. PERDEW and others. (No. 9,244.)

Filed July 26, 1884.

1. WATER-RIGHTS—INJUNCTION.

A lawful appropriator of water is entitled to an injunction against a trespasser.

2. SAME—RIGHTS OF TENANTS IN COMMON.

Of tenants in common, each has a right to enter upon and occupy the whole of the common property, and every part thereof, and may recover the whole thereof from a trespasser.

3. SAME—ACTION AGAINST TRESPASSER.

An arrangement as to periods of user of water, by co-tenants, affects them only, and is for their convenience, and is no defense to an action of trespass against a third party by one of the co-tenants.

4. SAME—DIVERSION OF WATER—INJURY TO ALL AND EACH.

As co-tenants are entitled to use *all* the waters, when an outsider diverts any from them, or any of them, he injures all and each of them.

In bank. Appeal from the superior court of San Bernardino county.
Byron Waters, for appellant.

Satterwhite & Curtiss, for respondent.

THORNTON, J. The court rendered the following decision:

"*First.* That at various times, since about the year 1854, a large number of persons, owning and occupying separate tracts of land, consisting of farms on the rancho of San Bernardino, and other farms immediately to the north and west of said rancho, and residence lots and gardens, orchards and vineyards, in the town of San Bernardino, diverted and appropriated the waters of Lytle creek by means of water-ditches and dams, and conducted such waters upon their said lands for irrigating the same, and for household and domestic uses thereon. Such appropriations were usually made by persons owning and occupying lands in the same vicinity or neighborhood, acting in concert for their common benefit, in appropriating a portion of the waters of the creek into a main ditch, to be conducted to their neighborhood, and thence through distributing ditches to their respective and individual tracts of land.

"*Second.* That within about two years after 1854, and before the end of the year 1856, by means of several such appropriations mentioned in finding one, all of the waters of said Lytle creek had been so diverted and appropriated, and have ever since been appropriated and used for irrigation and household and domestic uses upon the lands aforesaid, and other lands occupied and cultivated by defendants, as hereinafter stated.

"*Third.* That such waters so appropriated and used were used by the various persons who appropriated the same, and those claiming to be their successors, by turns, separately and consecutively, each upon his separate land, for a certain length of time, measured by hours and minutes, under the regulations of the board of water commissioners of this county and the overseers of ditches, prescribing how often and the length of time each should be entitled to use the same, varying in time according to the extent of interest each held in the waters so appropriated, except, however, that one George Lord, one of the first appropriators, has always to the present time used said water upon his farm of about forty acres, whenever his needs required it, at any time, under a claim of right so to do. Such separate interests in the water were held by the individuals separately, and sold, transferred, or abandoned by them, respectively, at their will.

"*Fourth.* That in June, 1867, the defendant A. G. Perdew settled upon, and has ever since resided upon and cultivated, a tract of government land near said Lytle creek, and within the flow of the same, but lying above the aforesaid lands of original appropriators mentioned in finding one, and about the time of his said settlement thereon he diverted and appropriated from said Lytle creek a stream of water, through a ditch constructed by him, for the purpose of irrigating his said land, and for household and domestic uses thereon, and he has ever since conducted, appropriated, and used such stream of water upon his said land, to irrigate the same and crops thereon, and for household and domestic purposes.

"*Fifth.* That the plaintiff was, at the commencement of this action, the owner, through mesne conveyances and transfers, of certain interests in or a portion of the waters of said Lytle creek, appropriated as aforesaid, prior to the time that said defendant A. G. Perdew made his appropriations aforesaid in 1867, as mentioned in finding four, equal in amount to the use of all the waters of said creek one hundred and twenty-four hours and nineteen minutes out of each and every three hundred and seventy-two hours, and since the commencement of this action, and before filing the supplemental complaint herein, the plaintiff has acquired and now owns, through mesne conveyances, an additional interest in or portion of said waters, conveyed to it

directly by one E. H. Morse, appropriated as aforesaid, prior to the aforesaid appropriation of said defendant A. G. Perdew, equal in amount to the use of all the waters of said creek eight hours out of each three hundred and seventy-two hours, making in all an amount equal to the use of all the waters of the creek one hundred and thirty-two hours and nineteen minutes in each three hundred and seventy-two hours; or, in other words, in the same proportion to the constant flow of the whole stream as the period of one hundred and thirty-two hours and nineteen minutes is to three hundred and seventy-two hours. But the said appropriation and use by defendant A. G. Perdew is prior in time to any other right or interest of the plaintiff.

"Sixth. That such appropriation by the defendant A. G. Perdew was not made with the consent of plaintiff, or any of its grantors or predecessors in interest through whom it derives its aforesaid interest in said waters which it now owns as aforesaid, and said defendant did not appropriate and has not used said water with intent to deprive any prior appropriator of any of said waters, or the successors in interest of any of such prior appropriators of any of the said waters which had been previously appropriated, and his use of said waters and right to use the same has been several times, to-wit, more frequently than once in five years since his appropriation thereof, interrupted and disputed by others of the said original appropriators and their successors in interest.

"Seventh. That in the year 1879 the defendants A. G. Perdew, G. F. R. B. Perdew, and R. P. Perdew constructed in what is known as South Fork canon, but designated in the answer as Dry canon, and in Grapevine canon, flumes for the purpose of carrying water and which did carry water flowing in said South Fork canon to the amount of about fifty-eight inches under a four-inch pressure, and in said Grapevine canon to the amount of about ten inches under a four-inch pressure, and conducted such water through said flume into the main streams of Lytle creek aforesaid, above where any of the water is diverted from said creek as aforesaid. The lands upon which said flumes are constructed, and upon which the streams in said canons were flowing, are unsurveyed public lands of the United States, and unoccupied except by such flumes.

"Eighth. That all the waters in said two canons, and all of that which was conducted through said flumes into the main streams of Lytle creek as aforesaid, have, before said fluming by defendants, always naturally flowed into the said main streams of Lytle creek, and constituted tributaries of the same, and the quantity of water in said Lytle creek has not in any manner been increased by reason of the fluming of the waters from said canon by defendants as aforesaid.

"Ninth. That in addition to the aforesaid appropriation by A. G. Perdew in 1867, as stated in finding four, and ever since the construction of the aforesaid flumes by defendants, as stated in finding seven, the said defendants have diverted from said Lytle creek, and used upon their respective farms, as alleged in their answer, an amount of water equal to that flowing through their said flumes into the main streams of Lytle creek as aforesaid, and if not restrained will continue so to do.

"Tenth. That the amount of water or water interest owned by the plaintiff at the commencement of this action, as set forth in finding five, was composed of several separate interests which it had acquired at different times from the various owners thereof, previously held and owned by them in severalty, as stated in finding three; and the plaintiff has never in any manner been allotted any particular time or times during which it should use the aforesaid portion or quantity of the waters belonging to it.

"Eleventh. That the said Lytle creek water-ditches, lands, and premises mentioned in the foregoing findings are all situated in the county of San Bernardino, state of California."

As conclusions of law the court decides :

"That the defendants A. G. Perdew, G. F. R. B. Perdew, and R. P. Perdew are not, nor are any of them, entitled to divert or take out of Lytle creek any water as the equivalent of the water conducted into the main streams of said creek through the flumes constructed by them in the South Fork canon, designated in their answer as Dry canon, and in Grapevine canon, and that they be perpetually enjoined from diverting or taking out any water from said creek as such equivalent, or by virtue of conducting the aforesaid waters from or through the said canons, or either of them, into the said creek. Also, that the defendants G. F. R. B. Perdew and R. P. Perdew have no right, title, or interest in or to the waters of said Lytle creek, or the use thereof, and they and each of them, the said G. F. R. B. and R. P. Perdew, be perpetually enjoined from diverting, obstructing, or in any manner interfering with the waters of said Lytle creek, or any part thereof, or the regular and constant flow of the same, by virtue of any right, title, or interest heretofore acquired or held by them, or either of them. Also, that plaintiff is the owner of an interest in or portion of the waters of said Lytle creek equal in amount or quantity to the use of all the waters of said creek, one hundred and thirty-two hours and nineteen minutes out of each and every three hundred and seventy-two hours; that is to say, in the same proportion to the constant flow of the whole stream as the period of one hundred and thirty-two hours and nineteen minutes is to three hundred and seventy-two hours. Also, that plaintiff recover from said defendants A. G. Perdew, G. F. R. B. Perdew, and R. P. Perdew its costs of this action necessarily expended or incurred. That judgment be entered accordingly."

A decree passed accordingly.

The court, as will be perceived from the foregoing, granted the relief desired against G. F. R. B. Perdew and R. P. Perdew, and granted it partly against A. G. Perdew. The action was dismissed as to Hackney.

The appeal by plaintiff brings up that part of the decree which relates to A. G. Perdew; and we see no reason why, on the findings of fact, it is not entitled to an injunction against him as well as the other defendants. The entire waters of Lytle creek had been appropriated prior to any appropriation by A. G. Perdew. Under those prior appropriators the plaintiff held. The defendant just mentioned was a trespasser, using the waters of the creek without any right whatsoever. Why a lawful appropriator should not be entitled to an injunction against a trespasser we cannot perceive. It is said that the waters were appropriated severally by those who did appropriate them. Concede this to be so, and we do not perceive that it makes any difference. If they are tenants in common of the water, such tenants and each of them are tenants seized *per my* and not *per tout*, and entitled to the possession of the whole. This must be so, because no one of them can certainly state which part of them is his own. They hold by unity of possession, though their titles be distinct. If this unity is destroyed the tenancy no longer exists. See 2 Bl. Comm. 191, 192; *Carpentier v. Webster*, 27 Cal. 524.

In the case just cited from 27 Cal. it is held that each and every

such tenant has the right to enter upon and occupy the whole of the common property, and every part thereof. 27 Cal. 545.

It is said in *Williams v. Sutton*, 43 Cal. 71, that each tenant in common is seized *per my et per tout*; such a tenure would make each tenant a joint tenant. 2 Bl. Comm. 182. Concede this to be so, and the view we take herein receives additional force.

"A person without title, and wrongfully in the possession, cannot gainsay the right of each of the tenants in common to the possession of the whole. As between tenants in common and a trespasser, each tenant in common is better entitled to the possession than a wrong-doer." Per CROCKETT, J., 43 Cal. 71. He can maintain an action against a trespasser and recover possession of the whole estate held in common. This being so, it follows that he can take steps to protect the whole. It would be an anomaly in the law if such tenant could recover the whole property from a wrong-doer, and could not alone intervene to protect it from nuisances and trespasses which can be redressed by the preventive process of injunction. Whether joint appropriators, holding the estate as joint tenants or tenants in common, the same is the result. Each can recover the whole, or take the necessary steps to protect the whole against the acts of a wrong-doer.

It is found that the interest of plaintiff in the waters of Lytle creek, derived from some of the first appropriators, is equal to the use of all the waters of the creek 122 hours and 19 minutes in 372 hours, (see finding 5;) that these waters so appropriated and used by the first appropriators were used by the persons so appropriating the same, and their successors, by turns, separately and consecutively, each upon his own land, for a certain length of time, under the regulations of water commissioners and the overseers of ditches, prescribing how often and the length of time each person should be entitled to their use, varying in time according to the extent of interest each held in the waters so appropriated, (see finding 3,) with one exception, which need not be further mentioned; that such separate interests in the waters were held by the individuals separately, and sold, transferred, or abandoned by them each at his will, (finding 3;) that the amount of water interests owned by plaintiff was composed of several separate interests which it had acquired at different times from the various owners thereof, previously held and owned by them in severalty, as stated in finding 3, but the plaintiff has never in any manner been allotted any particular time or times during which it should use the portion or quantity of the water belonging to it. Finding 10. This finding is singular in this: It would seem from the preceding findings that such allotment had been made to the parties under whom plaintiff derives title. This being so, why does it not take the places and times of its grantors? But if this time or times had not been fixed or allotted to plaintiff, how does that concern defendant A. G. Per-dew? He is a trespasser on the rights of plaintiff, and each and all

of his co-tenants. Perdew is using the waters without right, and claims to use them at all times against all others. Finding 4. No limit as to time of use is found as to him. It would be strange if one tenant in common could not enjoin a threatened injury. *Van Winkle v. Curtis*, 2 Green, Ch. 422. What has he to do with the circumstance that the time or times when plaintiff is entitled to use these waters has not, as between him and his co-appropriators, been fixed in any way? This arrangement as to the periods of user concerns only the co-tenants; is made for their convenience and benefit, to avoid disputes between them, and for carrying out in an orderly manner their employment of those waters. The fact that Perdew is trespassing on the rights of plaintiff is sufficient to entitle it to relief.

It is urged that inasmuch as it does not appear that A. G. Perdew is using the water during the period the plaintiff is entitled to use it, that he is inflicting no injury on its rights. How can this be said? He is claiming to use the water at all times, and will no doubt use it unless restrained by an order or decree of the court. Suppose the time of plaintiff's use was fixed, and A. G. Perdew used water up to within a minute of the time that plaintiff was entitled to use it. According to this contention, Perdew would be violating no right of plaintiff. But can it be said that he is not then injuring plaintiff? Observe, this defendant is using it when another or others of the appropriators have a right to use it, and may be using it. Can it then be said that he is not taking out more water than the appropriators, entitled to use it, are allowed to take out? And is he not then diminishing the water which would come to the plaintiff? We cannot allow any force to this argument. The contention, we think, is untenable. The co-tenants are entitled to use all the waters, and when an outsider diverts any from them or any one of them he is injuring all and each one of them. He may be doing more injury to the one entitled to use it at the time he is diverting it, but he is at all times, when diverting, guilty of a trespass on the rights of each and every one of them, and each of them has a right to have the preventive power of a court of justice to put a stop to his illegal acts.

It is urged that all the co-tenants must be before the court, and all their rights adjudicated, before plaintiff is entitled to relief. Why, we cannot see. There was no dispute as to the rights of the co-tenants. Plaintiff makes no complaint as to them, or any of them. The rights of each are set forth in the findings, and plaintiff makes no complaint as to the findings or decree in this regard. The decree, if in favor of plaintiff, affects no rights of his co-owners. It cannot be pleaded against them, or any of them. It is only where the court cannot determine the controversy between the parties before it without prejudicing the rights of any of the co-owners, or of any other person, that other parties must be brought in. When the contest can be settled without affecting the rights of others, there is no ground

or reason for bringing in any other parties. Nor is such procedure required by section 389, Code Civil Proc.; *Settembre v. Putnam*, 30 Cal. 497; *Van Bokkelin v. Cook*, 5 Sawy. 587.

That the act complained of here is a nuisance, see Civil Code, § 3479. That any person affected as the plaintiff is can maintain the action, see Code Civil Proc. § 731. Where three out of forty-seven tenants in common filed a bill for an injunction to restrain the digging of stone on the common property, an objection for want of parties was not allowed. *Ackroyd v. Briggs*, 14 Weekly Rep. 25; 2 Joyce, Inj. 1348; *Waring v. Crow*, 11 Cal. 366.

In our judgment the plaintiff is entitled to the decree of the court enjoining A. G. Perdew from the diversion of any of the waters of Lytle creek under the appropriation of 1867, as set forth in finding 4, or any other diversion or obstruction of such waters subsequent to the inception of the interest owned by plaintiff and declared in the findings.

The judgment is reversed as to A. G. Perdew, and the cause remanded, with directions to the court below to enter a judgment in favor of plaintiff and against A. G. Perdew, as follows: That A. G. Perdew be perpetually enjoined from diverting, obstructing, or in any manner interfering with the waters of said Lytle creek, or any part thereof, or the regular or constant flow of the same, by virtue of any right, title, or interest claimed or held by him under any appropriation or claim of such waters, made by him at any time subsequent to the appropriation of plaintiff, or of those from whom it derives title, prior to June, 1867. The court below is further directed to execute the decree by mandatory or prohibitory injunction, as may be found necessary. See Goold, Wat. § 552, and cases cited. In other respects the judgment is affirmed.

WE CONCUR: SHARPSTEIN, J.; MYRICK, J.; ROSS, J.

SUPREME COURT OF CALIFORNIA.

65 Cal. 434

CITY OF VISALIA v. JACOB. (No. 9,441.)

Filed July 26, 1884.

STREET—TITLE BY ADVERSE POSSESSION—OBSTRUCTION—NUISANCE—ABATEMENT.

Title by adverse possession cannot be acquired to a public street in a city. An occupation or obstruction of such a street is a nuisance, to abate which an action may be brought.

Department 1. Appeal from the superior court of Tulare county.

A. J. Atwell, for appellant.

Oregon Sanders, for respondent.

BY THE COURT. The action is to recover the possession of certain lands, and was commenced November 24, 1883. The complaint avers that plaintiff, on the twenty-seventh day of February, 1874, was seized in fee of "all that part of Center street, (describing it,) and ever since that time has been, and still is, seized of and entitled to the possession of said land, *the same being a portion of a public street*, duly laid out and dedicated to the public use;" that on the twenty-eighth of February, 1874, defendant entered into possession of the demanded premises, and thence hitherto and still unlawfully withholds the possession thereof, etc. Defendant demurred on the ground that the complaint showed the cause of action was barred by the statute of limitations. Defendant also demurred specially that the complaint was ambiguous, unintelligible, and uncertain, in that it did not appear therefrom when the lands were laid out and dedicated as a public street. Defendant also demurred generally. The court below sustained the demurrers, and, plaintiff declining to amend, a judgment was entered in favor of defendant, from which plaintiff appeals.

If, construing the complaint more strongly against the pleader, it only shows that the street was dedicated at *some time* before the action was commenced, the judgment or order upon the special demurrers was proper. So construing the complaint, it would not appear but defendant had adverse possession for more than five years before the lands were dedicated as a public street. But aside from the fact that lands actually possessed adversely cannot be dedicated to the use of the public by their owner, the language of the complaint plainly avows that the lands were a public street, laid out and dedicated as such, from the twenty-seventh of February, 1874. The rule that an averment is to be taken more strongly against a pleader does not authorize the courts to deprive language of its ordinary signification.

It is urged by respondent that the fact the lands were dedicated as a *street* does not deprive the defendant of the benefit of his five

years' adverse possession. An occupation and obstruction of a public street is a *nuisance*, and every continuance of that which was originally a nuisance the law considers a new nuisance, to abate which an action may be brought on behalf of the public, or by a private person specially injured. As against such an action no one can acquire a defense by adverse occupation. It was so held with reference to a street over lands *not* included within those covered by the Van Ness ordinance, in San Francisco. *People v. Pope*, 53 Cal. 437. It is true, an action of ejectment may be maintained by a municipal corporation for the recovery of the possession of a street wrongfully possessed by an individual, whether the corporation owns the *fee*, or the adjoining proprietor retains it. In the latter case, the right of the municipality to regulate the public use, and for that purpose to possess, use, and control the property, is treated by the courts as a legal and not merely an equitable right. Dill. Mun. Corp. (3d Ed.) § 662; *San Francisco v. Sullivan*, 50 Cal. 602. But it does not follow that such an action is barred by an adverse possession for a statutory period. In *San Francisco v. Calderwood*, 31 Cal. 589, it seems to have been held that the ejectment would be barred. But in that case it was found that the "slip" had never been dedicated to the public use. In *Hoadly v. San Francisco*, 50 Cal. 275, it was held that as to land granted to the city by certain acts of congress and the state legislature, in trust for the public, private persons cannot acquire the right to it by adverse possession. The land there in controversy was "pueblo" land, within the operation of the Van Ness ordinance, etc. But the rule laid down seems to have been understood as applicable to all streets. *People v. Pope*, *supra*. After a street has been legally laid out and dedicated, the municipal government retains or acquires a right of entry as agent of the public, clothed with the trust and duty of protecting and regulating the public use. The right of possession is held by the corporation for the benefit of the public, and this right cannot be conveyed to any private person. The lands so held are as effectually withdrawn from commerce, while the street continues, as are those spoken of in *Hoadly v. San Francisco*. As the municipality cannot convey the title, or relieve itself of the trust, private persons are virtually precluded from acquiring it.

Judgment reversed and cause remanded, with directions to the court to overrule the demurrers to the complaint.

65 Cal. 433

VOGAN, Adm'r, v. CAMINETTI, Adm'r. (No. 9,223.)

Filed July 26, 1884.

MORTGAGE—EXTENT OF SECURITY—FORECLOSURE—AMOUNT OF JUDGMENT.

Where the object of a transaction was to indemnify one party for the liabilities he had or might incur on behalf of the other, a note and mortgage given therefor served only to limit the extent of the security. Upon foreclosure of that mortgage, the amount for which judgment should properly be rendered was the amount the mortgagee had paid under the liability for which he was secured, with interest from day of payment.

Department 1. Appeal from the superior court of Amador county. *Eagon & Armstrong* and *S. P. Seaniker*, for appellant.

R. C. Rust and *A. Caminetti*, for respondent.

BY THE COURT. The object of the transaction between the deceased Vogan and the deceased Shipman being to indemnify Vogan for the liabilities he had incurred and might incur on Shipman's account, the amount of the mortgage and note served only to limit the extent of the security. Upon the foreclosure of that mortgage, the amount for which judgment was rendered was, properly, the amount the mortgagee had paid under the liability for which he was secured, with interest from the day of payment. 1 Jones, Mortg. § 384.

Judgment and order affirmed.

65 Cal. 456

COTTLE v. SPITZER. (No. 9,598.)

Filed July 26, 1884.

TAXATION—EXEMPT PROPERTY—FRUIT TREES—"GROWING CROPS."

Fruit trees are not "growing crops," in the meaning of the provision of the constitution of California exempting such crops from taxation.

In bank. Appeal from the superior court of Santa Clara county. *S. F. Leib*, for appellant.

J. H. Campbell, for respondent.

BY THE COURT. For the reasons stated in the opinions of the judges of the superior court, hereto subjoined, judgment affirmed.

The following are the opinions referred to:

JUDGE SPENCER'S OPINION.

"Application for an alternative writ of prohibition by the owner of certain lands, and fruit trees growing thereon, to prevent the assessor from assessing said trees for the purpose of taxation. The contention of the plaintiff is that this class of property is included in the term 'growing crops,' as found in the constitution of the state, exempting the last-named class of property from taxation. It is the settled policy of all governments, republican in form,

that the burdens of taxation shall fall equally upon their citizens. Where resort is made to direct *ad valorem* taxes, for the purpose of revenue, in order to carry out both the letter and spirit of that policy, it becomes necessary that property should be assessed for taxation, not only according to a just and uniform standard of value, but that all property should be thus assessed and taxed; for if the property of A. is taxed and that of B. is left to go untaxed, it is manifest that the burdens of taxation have been very unequally imposed upon the people. Consonant with this principle, which is a corner-stone in the structure of a free government, the constitution of the state provides that 'all property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law.' And in order that there should be nothing left to construction, whereby any particular kind of property may escape payment of its just proportion of taxes, it is added: 'The word "property," as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership.' Article 13, § 1. Upon such constitutional provision, set forth in all its fullness, iterating a cardinal principle of justice, is ingrafted the apparent exception thereto, 'that growing crops * * * shall be exempt from taxation.' It is a rule of construction, of uniform application, that he who seeks to avail himself of the benefits of an exception to a general rule or provision must show with reasonable clearness that he has brought himself within the terms of its qualifying clauses. He can take nothing by implication, and all the intendments are against him.

"Thus premising, we proceed to inquire the meaning of the term 'growing crops,' as used in the organic law. 'Crop,' as defined by Webster, is '(3) that which is gathered; the corn or fruits of the earth collected; harvest; the word includes every species of fruit or product gathered for man or beast; (4) corn or other cultivated plants, while growing, [a popular use of the word;] (5) anything cut off or gathered.' The etymology of the word 'crop' appears to be from the Saxon 'crop' or 'cropp,' signifying the crop of a fowl, a cluster of ears of corn, grapes, ears of corn, and from the Welsh 'cropiad,' a gathering or taking hold of. Webst. *verb.* 'Crops.' The definition given by Webster is even broader than the popular signification of the word. Under the former, as we see, not only is meant grain produced from annual vegetation, but also fruits from trees and perennial plants. But it is at least doubtful if, under the common and restrictive acceptation of the term, anything more would be understood than products from annual plants, as cereals, maize, etc., and the latter appears to be the sense in which the term is employed in technical legal parlance. 'Crop,' says Bouvier, 'is nearly synonymous with emblements,' and by this term is understood the crops growing upon the land. By crops is here meant the products of the earth which grow yearly, and are raised by the annual expense and labor, or 'great manurance and industry,' such as grain; but not fruits which grow on trees, which are not to be planted yearly, or grasses and the like, though they are annual.' Bouv. Law Dict. word, 'Emblements.'

"It may be conceded, and correctly, that at the present day, in this state at least, the word 'crop,' taken in its most comprehensive sense, includes fruits grown on trees; but I think it can be affirmed, without serious contradiction, that trees themselves, capable of producing fruit, never have been included in that term. As I understand the able and ingenious argument of the learned counsel for plaintiff, he does not claim that, *ex vi termini*, the words 'crops,' or 'growing crops,' include fruit-bearing trees, but because the constitution declares that 'growing crops shall not be taxed, and inasmuch as the fruit growing upon the trees is a growing crop,' and that the tree is necessary for the production of the fruit, and is substantially valueless for any other purpose, therefore the taxing of the tree is in effect taxing the crop

growing or that may thereafter grow thereon, because, *arguendo*, there being no tree, there could be no crop. In furtherance of the theory thus advanced, the elementary principle is invoked that whatever is forbidden to be done by direct means will not be permitted to be accomplished by indirection. A familiar application of this principle is the unsuccessful attempt sometimes made by state legislation to evade the provisions of the constitution of the United States, forbidding the several states from imposing duties on imports and exports. *Brown v. Maryland*, 12 Wheat. 444; 24 How. 123; 15 Pa. St. 353. In the cases cited it was held that the imposition of a license tax by the state upon a person engaged in importing goods, as such, or requiring the payment of stamp tax upon bills of lading of gold or merchandise exported from the state, was in effect and by indirect means taxing the goods imported or exported by those instrumentalities. It was necessarily a burden upon the goods themselves; but I fail to see the applicability of the principle invoked to the subject under consideration. If a tree is not in fact a part of the crop of fruit growing thereon, I do not understand how it can be made to appear that the taxing of the former is substantially and in effect taxation of the latter. Perhaps some confusion might be avoided in dealing with this question if it be borne in mind that a crop, when perfected, does not fall within any exemption or exception, and is the subject of taxation. By the very terms of the constitution the exemption of crops from taxation is temporary, and only continues during its growing state. We have, then, an article of property—a tree—that year by year produces another article of recognized value, and which, if taxed from the time it comes to perfection as long as it continues in existence, how can it be said that the taxing of the matrix is illegal, or even unjust, when its product is also taxable? I can understand that the system of reasoning sought to be enforced by the plaintiff might have weight if the product of the tree could not, at any time, or under any circumstances, be taxed. If the only use to which an article can be put, and therefore the only value it has, is to produce untaxable property, it might with reason be claimed that the article cannot have any taxable value.

"In the wide range taken in the argument of this case, much was said in relation to the beneficent policy of the law in encouraging certain branches of industry by exemption from taxation, and that such supposed exemption should be encouraged, and passages in the organic law so construed as if possible to effectuate that object. The disposition of the question involved does not require an examination into the expediency or in expediency of that kind of enactment, but it may not be out of place to here remark that if the correct principles of free government require that taxation should be equal, it is at least possible that the advantage gained in the direction of fostering a particular industry or set of industries, at the expense of others, may be outweighed by the general injury resulting in the downfall of one of the pillars of the temple of liberty. In conclusion, it may be suggested that it is even doubtful if the framers of the present constitution intended to exempt any private property from taxation. As we have seen, the section already referred to commences with a sweeping declaration that all private property shall be taxed, which is followed by the provision that growing crops, property used exclusively for public schools, and such as may belong to the United States, this state, or to any county or municipal corporation within this state, shall be exempt from taxation. It will be noticed that all property referred to, except growing crops, is such as belongs to government, either federal or state, and therefore is not in its nature taxable. In enumerating it no attempt is made to exempt property otherwise taxable, and, in relation to the single item of 'growing crops,' my conclusion is that it is in effect a declaration that it is not sufficiently tangible to be treated as property; it is a transitory state, starting with the embryo and ending with the matured product, at no two consecutive points of time in the same condition. To at-

tempt to place upon it any money value would be to indulge in the merest guess-work.

"It has been held by the supreme court of this state that a lessee of land is the owner of a so-called growing crop, although his husbandry has extended only to the preparation of the soil for the reception of the seed; that it is a potentiality before any seeds are sown, which is subject to a valid mortgage under the law authorizing the mortgaging of growing crops. *Arques v. Wasson*, 51 Cal. 620. I apprehend it would puzzle the most experienced appraiser to fix a value upon it, or to even recognize it as property. The fact is undeniable that land planted with orchard trees is ordinarily more valuable than the naked soil. From a legal stand-point the land and the trees growing thereon are, together, but one piece of real estate, and might, with propriety, be assessed as such in gross. The legislature has seen fit, however, to require the land and trees to be assessed separately. This it has the constitutional power to do, and no hardships can result from such a course if each is fairly valued, as the total value is not increased thereby. I am of the opinion that it is the duty of the assessor to assess fruit, nut-bearing, and ornamental trees, and vines not of natural growth, as directed in section 3617 of the Political Code.

"It results that the writ prayed for should be refused; and it is so ordered."

JUDGE BELDEN'S OPINION.

"I entirely agree in the views presented and conclusions reached by my associate, Judge SPENCER. These opinions were prepared without previous consultation. To the reasons of my associate I subjoin my own.

"The rule as to the construction, both of constitutional provisions and of statutes, was well summarized by our supreme court in *People v. Eddy*. Said the court: 'The word "property" as used in the constitution is to be construed in the ordinary and popular sense, and this is the general rule for the interpretation of constitutions and statutes, unless the context shows that the words are used in a technical or in some arbitrary sense.' 43 Cal. 336. For the court to apply any other rule upon its views, either of public policy or of popular interest, would be a mere judicial usurpation of legislative power. What, then, was understood by the convention which framed our present constitution, and by the people who ratified it, by the term 'growing crops'?"

"By lexicographers "crop" is defined as 'that which is gathered from a single field, or of a single kind of grain or fruit, or single season; especially the valuable product of what is planted in the earth; fruit; harvest.' Webst. 'That which is gathered as fruit; the harvest.' Worcester. In popular parlance the word has the same universal meaning, and the phrases 'cropping contracts,' 'interest in crops,' 'harvesting crop,' and the like are used in the precise sense in which they are defined in the dictionaries.

"This phrase has also received a practical and general construction in the action of public officials. In 1851 the legislature attempted, with other classes of property, to exempt 'growing crops' from taxation, and from that time until the decision in *People v. McCreery*, in 1867, this exemption was conceded by the assessors. During all this period it is a matter of universal knowledge that this exemption was only asserted and allowed for annual and immature crops, and it was never pretended that trees or vines of perennial growth came within it.

"Again, in 1855 a statute provided 'that no person, for mining purposes, shall destroy or injure any growing crops of grain or garden vegetables growing upon the mineral lands of this state, nor undermine or injure any house, building, improvements, or fruit trees standing upon any mineral land and the property of another.' In this provision a 'growing crop' was not understood by the legislature to mean growing trees, or we have a useless repetition of phrases.

"Again, in 1859, and while the general exemption as to 'growing crops'

was in practical effect, it was enacted: 'No tax of any nature whatever shall be hereafter assessed or collected from the owners, managers, or agents of newly-planted vines or olives, on account of the same, until the vine shall have attained the age of four years and the olive seven years.'

"A clearer indication that these were not then understood as included in the term 'growing crops,' already exempted, cannot be conceived; while, by a familiar rule of construction, the special designation of 'grapes' and 'olives' as exempt, is the legislative declaration that all trees not so specified are to be taxed. In 1868 the supreme court, following the former decision of *People v. McCreery*, and making special application of the principles of that case, held that growing crops, the annual product of the soil, could not be exempted by the legislature from taxation. *People v. Gerke*, 35 Cal. 677.

"Again, in 1878, a statute providing for a lien upon growing crops enacted: 'The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of the mortgagor;'—an unmistakable recognition of the fact that the legislature then understood by a 'crop' that which in ordinary husbandry was to be severed from the land when utilized.

"These are but a few of very many statutory recognitions of the meaning of this phrase. They clearly establish that in the legislative mind, as well as in judicial decisions, the term had the same meaning as in lexicons and in the popular understanding, and this was the general understanding of this phrase when the convention assembled which framed the present constitution. That body consisted of representatives of every class and vocation,—of farmers who had benefited by the former exemption, and orchardists and vine-growers, who had been denied it; of legislators who had assisted in framing these laws; of lawyers who had discussed them; of judges who had construed and applied them. Such a body could not have been ignorant of the universal interpretation which this phrase had so long received from every branch of the state government and in the popular understanding. Before this body thus composed, and thus informed, came the question of the exemption of 'growing crops.' The members of this convention could but have been aware of the growing importance of the vine and fruit interest of the state. It was reported to them that fifty millions of capital was then employed in grape culture alone, and yet in all the debates upon this question, both upon the part of those who favored and by those who opposed this exemption, constant reference is made to a crop to be sown and harvested within the same year, and not even a suggestion that trees or vines of perennial growth were referred to.

"It is indeed strange that those thus familiar with this phrase, well knowing, as they must have done, the restricted application it had before received from every quarter; interested, too, in enlarging its scope and meaning,—should thus reproduce these exact words, without addition or explanation, intending or expecting that they could receive any larger or other meaning in the future than had been ascribed to them in the past. This conduct admits of but one explanation—that they then employed these words as usage, law, and legislation had already defined them.

"Eight months after the adoption of this constitution the legislature was in session. It was fresh from the people, and from the discussions through which the constitution had been ratified. In the senate were six, in the assembly two, representatives who had been members of the constitutional convention. Thus assisting in the interpretation of their own recent work, this first legislature enacted: 'The term "improvements" includes all fruit, nut-bearing, or ornamental trees, and vines not of natural growth.' 'The term "growing crops" includes only those crops which require an annual planting or sowing, or an annual harvesting.' These were expressly enacted as terms of

definition in the first revenue act passed after the adoption of the constitution. It but repeated all former definitions, and a more explicit and unequivocal interpretation of the phrase incorporated in the constitution cannot be imagined.

"It is, however, insisted that upon considerations of public policy this phrase should receive a broad or enlarged interpretation. Such is not the rule which the statute prescribes for the guidance of courts. Says the Code: 'In the construction of a statute or instrument the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein; not to insert what has been omitted, or to omit what has been inserted. * * *' Code Civil Proc. § 1858.

"Nor do I understand that these special exemptions, creating, as they do, manifest inequality as between the citizens, are to be extended by implication, or beyond their clear and expressed meaning. Said our own supreme court, speaking by RHODES, J.: 'It is impossible to conceive of any law which is more imperatively required by the principles of good government and the just rules of political economy to be equal and uniform than a revenue law. That the burdens of taxation should rest equally upon all property within the state ought to be axiomatic, not only in theory, but in practice.' *People v. Eddy*, 43 Cal. 336. To secure this equality was one of the controlling causes for the change in our state constitution. It was an expression of the general discontent with exemptions established by judicial decisions. It was in this spirit the convention deliberated, and that there might be equality in the burdens of government that the people ratified.

"To again extend through the courts and by implication these exemptions is to defeat the clearly expressed will of the people declared in their constitution, and reinstate the original grievance. It was insisted upon the argument that the fruit-growers would not be satisfied with an exemption accorded to the farmer and denied to themselves. That objection must be urged to the constitution which so provides, and not to the court, whose single duty it is to declare what is too plainly expressed to admit of doubt or to call for construction. Laws are understood as the expression of the will of the people, and are to be either enlarged or restricted in their operation to conform to the wishes or in the interests of any particular class. Were the inquiry made, it might be found that the discontent with exemption extended to other classes of tax-payers; nor would that discontent be allayed should the courts determine that orchards, whose yearly crop produced from \$200 to \$400 per acre to the owners, were to have the trees from which such revenue was derived valued no higher than the worthless brush which they supplanted. Such a decision, if it did not cause discontent, might, at least, excite surprise upon the part of less fortunate and less favored tax-payers. Beyond all this, there is a result which may follow from any mistaken interference with the assessor, to which attention may well be called. It is understood that in taxing trees the assessor is following the instructions of the state board of equalization, issued to the assessors of all the counties. It may be assumed that unless there be some judicial interference these directions will be followed by the several assessors. In the discharge of their duties the state board will apply one common rule to all the counties, and will pay no attention to the cause of any local undervaluation, whether brought about by the mistake of the assessor or of the court. In fact, to attempt to conform their duties to the varying decisions of the fifty-two counties of this state would paralyze the functions of this board and wholly destroy its utility. If any class of property shall, in any county, be undervalued, the state board cannot correct this mistake by raising the value of this particular property, but must raise the entire assessment roll of the county. This was expressly so decided in *Wells v. State Board of Equalization*, 56 Cal. 197, and is the course certain to be pursued. The result will be that if the other property within the

county shall be properly valued by the assessor, and this interest placed too low, the state board will raise the entire assessment of all the property, and every tax-payer will have his assessment raised above its just valuation the exact percentage that the state board determines fruit trees to be below their proper value. Several counties of the state—among them Santa Clara county—had last year a very instructive and most unsatisfactory experience in this matter, and a court may well hesitate at a course which may invite or compel a repetition of this experience. In my opinion, in all cases in which the revenue of the state is involved, and the question is one subject to revision by the state board, the proceeding should be inaugurated in the supreme court. A decision from that tribunal would be accepted by the state board as authority, and the assessors of all the counties would conform their actions to such decision. Thus no inequalities between the several counties would be found calling for this arbitrary, severe, and often most inequitable and oppressive interference upon the part of the state board."

66 Cal. 157

DUNNE v. DUNNE. (No. 7,763.)

Filed July 26, 1884.

1. ESTATES OF DECEDENTS—LEGACIES CHARGED ON ESTATE DEVISED.

Where the testator in his will charged legacies to plaintiffs upon the estate devised to defendant, the latter, in taking the benefit conferred by the will, also assumed the burden imposed by the testator, and thereby became personally liable to pay the legacies.

2. SAME—SUBSTITUTION OF LAND—INVESTMENT OF AMOUNT OF LEGACY.

Defendant, being authorized by the will to substitute for the legacies a tract of land of the value of such legacies, or to invest the money for the legatees in lands of that value, should have exercised his election within a reasonable time, and could not claim that he was entitled to await a final distribution of the estate before making such election.

3. SAME—INTEREST—JUDGMENT MODIFIED.

Judgment modified so that defendant be charged only with simple and not compound interest on such legacies.

Department 1. Appeal from the superior court of Santa Clara county.

McKisick & Rankin, for appellant.

Wm. Matthews, for respondents.

Ross, J. The provision of the will of the deceased, James Dunne, charging the legacies to the plaintiffs upon the estate devised to the defendant, is unequivocal. It reads:

"*Item.* I give and bequeath out of the estate by me given to my son James Francis Dunne, and as a charge thereon, ten thousand dollars (\$10,000 in gold to each of my daughters, Mary Felita Dunne and Bridget Caty Dunne, with the privilege, however, to my said son James Francis to satisfy said legacies by conveying to each of my said daughters a tract of land of the value of ten thousand dollars (\$10,000) in gold, or, at his option, to invest the said sums for my said daughters in tracts of land of the said value."

The testator died on the eighth day of June, 1874. His will was duly admitted to probate on the first day of August of the same year.

At the time of the death of James Dunne, the defendant was a minor, but he attained his majority on the fourth day of July, 1875. He then accepted the devise to him. Such is the effect of the findings of the court below, and the evidence is sufficient to sustain them. It shows beyond controversy that, with knowledge of the will and its provisions, he received as devisee the rents of the devised property; and this from the date of his majority. In taking the benefit conferred he assumed the burden imposed by the testator, and thereby became personally liable to pay the legacies. This obligation he was, however, authorized by the will to discharge by conveying to each of the legatees named a tract of land of the value of \$10,000 in gold, or by investing that sum for each of them in lands of that value. His election in that behalf he was bound to make within a reasonable time.

It is contended by counsel for appellant that the time for his election had not arrived when this action was commenced, nor has it yet arrived, because of the fact that there has been no distribution of the estate of the deceased, James Dunne; that until distribution is made defendant cannot know what he will receive. It is undoubtedly the general rule that a party is not bound to make an election until all the circumstances are known, and the state, condition, and value of the property is ascertained. But this rule, like all other general rules, should be applied only when it is reasonable to apply it, and when its application will promote, not defeat, justice. The property devised to the defendant, and upon which the legacies in favor of the plaintiffs were made a charge, consisted of real estate of great value,—it being an admitted fact in the case that the property of which the deceased died the owner was of the value of \$500,000, about four-fifths of which he devised to the defendant. It is further an admitted fact that after the payment of all the debts of the deceased, and after the payment of all of the expenses of administering the estate, and all charges thereon, there will remain property of the estate of at least \$100,000 in value. There is a provision of the statutes of this state relating to the estates of deceased persons to the effect that unless it satisfactorily appear to the court that the rents, issues, and profits of the real estate for a longer period are necessary to be received by the executor or administrator, wherewith to pay the debts of the decedent, or that it will probably be necessary to sell the real estate for the payment of such debts, the court, at the end of the time limited for the presentation of claims against the estate, must direct the executor or administrator to deliver possession of all the real estate to the heirs at law or devisees. In this case there was at the time of the death of James Dunne, and during the times spoken of in the record, an existing lease upon the property devised, and on which the legacies were charged; but defendant, from the time of attaining his majority in 1875, received the rents of the property, which aggregated some \$22,000, to the time of the commencement of this

action. Under such circumstances it would be unreasonable and unjust to hold that he was not bound to elect how he would discharge the legacies imposed upon the property until a decree of distribution should be entered in the matter of the estate. For years he enjoyed the fruits of the devised property, which he accepted with full knowledge of the conditions accompanying the devise. When he accepted the devise it became his duty to exercise within a reasonable time the option conferred upon him by the will. Having failed to do so, the court below, in our opinion, rightly held him liable to pay the legacies in money.

But in one particular we think there was error in the court below. Looking at the whole case,—considering the condition of the estate of the deceased, Dunne, the claims against it, and the action of the defendant with respect thereto,—we are of opinion that he should not have been charged with compound interest upon the legacies, but only with simple interest thereon at the rate fixed by the court. In this respect the judgment must be modified. We find no other error in it.

Cause remanded, with directions to the court below to modify the judgment in accordance with the views here expressed.

We concur: MCKINSTRY, J.; MCKEE, J.

65 Cal. 439

ROSS v. EVANS. (No. 9,293.)

Filed July 26, 1884.

1. PRACTICE—FINDINGS OF LOWER COURT—REVERSAL.

The lower court should find on all material issues, and a failure to do so will be ground for reversal.

2. ADVERSE POSSESSION—EVIDENCE.

To establish an adverse possession to lands, the claimant should prove that he or his grantor has paid all the taxes levied or assessed upon such lands.

3. SAME—STATUTE OF LIMITATIONS.

The statute of limitations does not commence to run in favor of an adverse possession of lands until after the issuance of the patent to such lands.

4. SAME—MESNE PROFITS.

A plaintiff is not entitled to mesne profits for land held by defendant by consent and acquiescence of plaintiff: but when the consent is withdrawn such profits commence to be payable only from the time of the withdrawal of consent.

Department 2. Appeal from the superior court of Lassen county.

E. V. Spencer, for appellant.

J. D. Goodwin, for respondent.

THORNTON, J. In this cause the findings do not pass on all material issues. The court finds an adverse possession by defendant and his grantors, from 1862 to the trial of the action in September, 1883,

against every one except the United States, of the lands for the possession of which it awards judgment to the plaintiff. It also finds that these lands were public lands in 1862, for a portion of which a patent of the United States was made to the plaintiff in 1875, and for the remaining portion he received a patent from the same in 1879, and that plaintiff's cause of action was not barred by the statute of limitations. This conclusion could only be reached on the ground that the defendant had not paid the taxes on the lands, as required by the act of April 1, 1878, amending section 325, Code Civil Proc. See Amendments to Code for 1877-78, Code Civil Proc., p. 99, Nemark's Ed. for 1883, § 335. The language of this act is that "in no case shall adverse possession be considered as established under the provision of any section or sections of this Code, unless it shall be shown that * * * the party or persons, their predecessors and grantors, have paid all the taxes, state, county, or municipal, which have been *levied and assessed* upon such land."

As to the matter of taxes and their payment, the court finds that these lands have never been assessed to defendant or his grantors since the year 1877, nor have they paid the taxes thereon; that since the year 1877, defendant and his grantors have paid all the taxes, state, county, and municipal, that have been assessed to them on any lands owned by them in Lassen county. If any taxes were *levied and assessed* (such are the words of the statute) on the lands in controversy, after the act of 1878 went into effect, the defendant must have shown that he or his grantors paid them, to establish his adverse possession. It is immaterial to whom they were assessed. Whether assessed to him or some other person, if he does not show that he or his grantors have paid them, he cannot make out his adverse possession. It may be that if such taxes were paid by some one else, defendant would only be called on to prove that fact. *Perhaps*, in such case, he would be relieved from paying them to make out his defense; but as to this we decide nothing, as the question is not before us. It will not be enough for defendant to prove that he has paid all the taxes levied and assessed on the land owned by him in the county where the land in suit is situated; for the defense of the statute of limitations admits that he does not own the land, unless by reason of his adverse possession, and the adverse possession is to be made out by this showing. The defect in the findings is that it is not made to appear by them whether any taxes were levied and assessed on the land in suit. If none were assessed, of course he is not bound to prove that he paid them. But, as said above, if the taxes were levied on the land and assessed to any one, defendant must, to make out the defense set up, show that he or his grantors paid them. Although, as a general rule, the law raises the presumption that public officers have done their duty, and therefore we must here indulge the presumption that the assessor did his duty and duly assessed the land, we do not think that this is a proper case to indulge such

presumption. We should not, in our view, determine the defense set up here and adversely to it upon a presumption that an officer has done that which he may not have done. We think there should have been a finding whether any taxes were levied and assessed on these lands after the act of 1878 went into operation and during the period of adverse possession.

The lands just referred to are those for which a patent was issued to the plaintiff in 1875. The action having been brought in May, 1883, the action to recover the lands patented to the plaintiff in 1879 could not have been barred. There were not five years between the date of the patent in 1879 and the commencement of the action in 1883. The lands as to which a finding is required in the matter of taxes, are the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 2, township 24 N., range 17 E., Mount Diablo meridian. In regard to the other lands embraced in the patent of 1879, as the bar of the statute could not have been complete when the action was begun, a finding as to taxes is entirely unnecessary.

The plaintiff recovered judgment for mesne profits for \$216.90, at the rate of \$72.30 per annum, for the three years next preceding the commencement of the action. It is contended by appellant that on the facts found this was error. It is found "that in the year 1860 defendant and his grantors located and took possession of a large tract of public land of the United States, embracing the land described in plaintiff's complaint, and commenced inclosing the same. While so engaged they sold plaintiff a portion of their said possessory claim, and, by consent and mutual agreement of defendant and his grantors on the one side, and plaintiff on the other, a division line was agreed upon, and a substantial division fence built thereon. This division fence was completed in 1862, and has been maintained up to the trial of this action; that said fence was recognized and acquiesced in as the division fence between plaintiff and defendant until the spring of 1883, at which time plaintiff attempted to change said fence so as to make it conform to the United States survey lines, and include the land in dispute, but was forbidden and prevented from doing so by defendant; that said fence completed the inclosure of the said possessory claim of defendant and his grantors; that since 1862 defendant and his grantors have possessed and occupied all the said land within their inclosure, and the defendant still does." It is further found that the claim of ownership of defendant was acquiesced in by plaintiff until the spring of 1883, as above stated. It thus appears that the possession of defendant of the land in dispute was with the consent and acquiescence of the plaintiff, under an agreement between the parties, and that defendant's claim of ownership of these lands was also acquiesced in by plaintiff. We cannot say, then, that the latter is entitled to recover rents and profits while such consent and acquiescence continued. It would be inequitable to allow the recovery of such rents and profits. The possession of defendant was consented to, and there was no understanding that any-

thing should be paid for it. The action for mesne profits is a liberal and equitable action, and will allow of every kind of equitable defense. *Murray v. Gouverneur*, 2 Johns. Cas. 438. See, also, *Ewalt v. Gray*, 6 Watts, 428; *Alexander v. Herr*, 11 Pa. St. 537; *Davis v. Doe*, 2 Cart. (Ind.) 599. This possession under the agreement was acquiesced in by plaintiff until some time in the spring of 1883, when he attempted to change his fence so as to include the land in dispute, which was prevented by defendant. This put an end to the consent and acquiescence, and from that time plaintiff was entitled to recover mesne profits. The mesne profits were allowed for a much longer period. The action was brought on the twenty-first of May, 1883. The mesne profits were allowed for a period of three years before the action was commenced, when they should have been allowed only from the day, in the spring of 1883, when the possession by acquiescence was put an end to and the consent withdrawn.

It follows from the foregoing that the judgment must be reversed. It is so ordered, and the cause remanded to the court below for a new trial, in accordance with the views herein expressed.

We concur: MYRICK, J.; SHARPSTEIN, J.

2 Cal. Unrep. 349

BERNHEIM v. PORTER. (No. 7,650.)

Filed July 27, 1884.

PARTNERSHIP—ABSENCE OF PARTNER FROM STATE—POWER OF COPARTNER TO SELL OR ASSIGN PROPERTY.

The fact that one member of a partnership leaves the state to reside out of it does not operate to dissolve the partnership carried on within the state, and, in such absence of his copartner, the remaining one may make an assignment of any part of the partnership property to a creditor, and such assignment will have precedence over a subsequent sale by the absent partner.

Department 1. Appeal from the superior court of Santa Cruz county.

F. Adams and *J. M. Lesser*, for appellant.

Andrew Craig, for respondent.

McKEE, J. This was an action to recover damages for the taking and detention of some personal property, which consisted of an engine and boiler and the machinery of a saw-mill. The plaintiff's claim of title to the property was founded upon a bill of sale made to them by one J. J. Blackburn, on the thirtieth of January, 1878. But at that time Blackburn had no possession of the property to deliver and no title to it to transfer. For the property was then in the possession of the defendant, to whom it had been delivered, under and in connection with a bill of sale of it, which was given to the defendant, on the thirteenth of November, 1877, by one Derastus Lear. Lear, the defendant's vendor, had originally purchased from the de-

pendant the engine and boiler for the purpose of using them in driving a shingle-mill on a tract of land in Santa Cruz county which belonged to him. That purchase was made in August, 1876. Being unable to pay all the purchase money, Lear secured the defendant for the payment of the balance due upon the purchase by his two promissory notes, secured by mortgage upon the tract of land and the engine and boiler "erected or attached to and embedded in the land, together with all and singular the machinery attached to and connected with said engine and boiler." That mortgage was dated and recorded August 7, 1876. Four months afterwards, Lear, by deed, conveyed the land subject to the mortgage to J. J. Blackburn. When Lear purchased the engine and boiler he and Blackburn were partners, under the firm name of Lear & Co., in the shingle and lumber business, and in running the saw-mill on the tract of land. The engine, boiler, and machinery were used by the copartnership in the business, and the court found they were partnership property. After running the business for a time, Blackburn abandoned the control and management of it to Lear, and, without obtaining a dissolution of the partnership or a settlement of its affairs, went to reside in Washington Territory. In his absence, Lear, being unable to pay the purchase-money mortgage, sold the property to the defendant, and gave him a bill of sale for the same, in the name of the firm, on the thirteenth of November, 1877, in satisfaction of the notes and mortgage. This sale by Lear transferred the title to the property to the defendant. For, in the voluntary absence of his copartner from the state, Lear had authority to make an assignment of any portion of the copartnership property to a creditor. Civil Code, § 2430; *Kemp v. Carnley*, 3 Duer, 1; *Arnold v. Brown*, 24 Pick. 89.

The absence of Blackburn in Washington Territory, where the plaintiffs obtained from him the bill of sale of the thirtieth of January, 1878, did not operate as a dissolution of the partnership; the partnership still existed; and if Blackburn's individual bill of sale transferred to the plaintiffs any interest in the property, the transfer did not carry with it a right to maintain an action in the nature of trespass or trover against the defendant, who had obtained possession of the property as a *bona fide* purchaser from the firm. Being still the copartner of Lear, the remedy of Blackburn or of the plaintiffs, as his assignees or vendees, lay in an action for the dissolution of the partnership and a settlement of the partnership affairs, so as to ascertain the interest of each in the concern.

The evidence sustains the findings, and the findings support the judgment.

Judgment and order affirmed.

Ross, J. I concur.

McKINSTRY, J. I concur in the judgment.

65 Cal. 470

THOMAS v. CROW. (No. 9,255.)

Filed July 28, 1884.

INSOLVENCY—INDORSEMENT OF NOTES—NON-RESIDENT HOLDER.

Where notes were made in this state, payable to a citizen of the state who had not indorsed them, before the discharge in insolvency of defendant, (the maker,) the title did not pass at that time to plaintiff, a non-resident holder, and they were the property of the payee, and subject to the proceedings in insolvency, and such non-resident holder was bound by the discharge in insolvency.

Department 1. Appeal from the superior court of Los Angeles county.

R. M. Widney, for appellant.

Graves & Chapman, for respondent.

MCKEE, J. At Los Angeles, the defendant, Henry Crow, on the eighth of December, 1877, made and delivered to Thomas A. Garey two promissory notes, each payable, one day after date, "to the order of Thomas A. Garey." On the twenty-second of June, 1878, Garey transferred and delivered said notes, without indorsement, to the plaintiff, John Thomas, as collateral security for an existing debt. At that time Thomas was, and has since been, a resident of the state of Missouri. On the fifth of December, 1881, Garey indorsed said notes, and on the next day the plaintiff commenced the action in hand to recover judgment upon them. But on the fifth of March, 1880, the defendant, Crow, was, by the judgment of the superior court of Los Angeles county, rendered in regular proceedings in insolvency, discharged from all his debts and liabilities. Now, the question arises whether the certificate of discharge is available as a defense to the action upon the notes. The plaintiff's contention is that it is not a bar to the action, because the holder of the notes at the time of the proceeding in insolvency was a non-resident of the state, of whose person, as a creditor of the insolvent, the insolvency court in this state had no jurisdiction, and therefore the judgment in insolvency did not affect his claims.

In *Ogden v. Saunders*, 12 Wheat. 213, the supreme court of the United States held that the insolvent law of a state operates only upon debtors and creditors who are inhabitants of the state; therefore, the discharge in insolvency of a citizen of the state of New York, under an insolvent law of that state, has no effect upon claims against him, owned and held by a citizen of the state of Kentucky. Afterwards, however, the supreme court of the state of Massachusetts, in the cases of *Scribner v. Fisher*, 2 Gray, 43; *Capron v. Johnston* and *Burrall v. Rice*, 5 Gray, 539, held that the discharge of an insolvent debtor by the decree of a competent court in Massachusetts, was binding upon his creditor, who was the inhabitant of another state, if the contract was to be performed in the state where the debtor re-

sided, and where he obtained his discharge. But the doctrine of those cases was practically overturned by the supreme court of the United States in *Baldwin v. Hale*, 1 Wall. 223, in which it was held that the non-resident indorsee of a promissory note, made payable in the state of Massachusetts, was not bound by a discharge of the maker from his debts obtained in a state court in Massachusetts, thus establishing the rule that a state insolvent law does not apply to contracts made within the state between a citizen of that state and a citizen of another state. *Kelley v. Drury*, 9 Allen, 27; *Stoddard v. Harrington*, 100 Mass. 87. Still, the rule does not relieve the plaintiff from the effect of the certificate of discharge upon the notes in suit; for they were made in this state by a citizen of the state, payable to a citizen of the state who had not indorsed them before the discharge; therefore, the title to them had not passed to the plaintiff at the time of the discharge, and they were the property of the payee, and subject to the proceedings in insolvency.

Judgment and order affirmed.

We concur: MCKINSTRY, J.; ROSS, J.

65 Cal. 474

Ex parte DONAHUE. (No. 10,978.)

Filed July 28, 1884.

CRIMINAL LAW AND PROCEDURE—ASSAULT WITH DEADLY WEAPON—VERDICT—JURISDICTION OF SUPERIOR COURT—PUNISHMENT.

On an information for assault with a deadly weapon, the verdict being simple assault, and therefore within the scope of the information, the superior court has jurisdiction to impose punishment for the latter offense.

Department 1. Petition for discharge on *habeas corpus*.

L. J. Maddox, for petitioner.

MCKEE, J. The petitioner complains that he is illegally restrained of his liberty under a judgment of the superior court of Stanislaus county, by which he has been sentenced to pay a fine of \$500, and in default of payment to be imprisoned in the county jail until payment of the fine, at the rate of one dollar per day for each day's imprisonment. This judgment was rendered upon a verdict of simple assault. The verdict, however, was rendered upon an information against the petitioner, which charged him with having committed the offense of assault with a deadly weapon. And it is contended that the judgment is void, because the court had no original jurisdiction of the offense of which the petitioner was convicted. Section 5 of article 6 of the constitution conferred upon the superior courts original jurisdiction in all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for. Section 11 of the same article

empowered the legislature to fix by law the powers, duties, and responsibilities of justices of the peace, subject to the proviso that the powers which might be conferred upon them were not in any case to trench upon the jurisdiction given to the courts of record. In carrying out these constitutional provisions the legislature provided as follows:

"Sec. 115. The justices' courts shall have jurisdiction of the following public offenses committed within the respective counties in which such courts are established: (1) Petit larceny; (2) assault or battery not charged to have been committed upon a public officer in the discharge of his duties, or to have been committed with such intent as to render the offense a felony; (3) breaches of the peace, riots, routs, affrays, committing a willful injury to property, and all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment." St. 1880, p. 79.

By these enactments justices' courts were given jurisdiction in criminal cases of assault; but they have no jurisdiction of the offense of assault with a deadly weapon. That is a felony, (Pen. Code, § 245,) and the superior court is the only court that has jurisdiction of it. It is, however, an offense which necessarily includes within it the offense of assault. And a person accused of the greater offense may be convicted of the lesser. Id. § 1159. But conviction of the lesser offense included within the greater, for which a person has been indicted, or informed against, and of which and of the parties the court has jurisdiction, does not take away or impair the jurisdiction; for, after conviction in a criminal case, which the court has jurisdiction to try, the duty devolves upon the court to impose punishment according to law for the offense of which the party has been legally convicted. As was said in *People v. English*, 30 Cal. 218: "The offense for which the defendant was indicted was of a higher grade than that for which he was convicted; still, as the offense of which he was found guilty is included in the crime with which he was charged, the verdict is to be followed by the same consequences that would have attended it had the indictment charged the lesser offense." It follows that the petitioner was convicted of an offense within the scope of the information, and the judgment upon it was one which the superior court had authority to render.

Writ dismissed.

Ross, J. I concur.

McKINSTRY, J. I concur in the judgment. The superior courts have jurisdiction in civil cases in which the demand, exclusive of interest, amounts to \$300, and "in all criminal cases amounting to felony," etc. Const. art. 6, § 5. The "demand" in civil cases is determinable by reference to the complaint, and it is settled that, if the amount demanded is \$300, the court has jurisdiction to render a judgment for less than \$300. The language of the section itself im-

ports that the criminal jurisdiction, so far as it is conferred by the clause above quoted, is to be determined by the nature of the offense charged in the indictment or information. A demand of \$300 includes a demand for every less sum, and a charge of any felony includes a charge of every misdemeanor which constitutes one of the elements that go to make up the greater crime.

We must presume that the framers of the constitution had in view the common-law rule, that one charged with a crime may be convicted of a less offense necessarily included in the crime charged. To reach the construction of the provision of the constitution claimed by petitioner to be the correct construction, we would be obliged to hold that, although the indictment or information includes a charge of misdemeanor, the party charged cannot be tried for the misdemeanor in the superior court, and, as a consequence, that an acquittal in the superior court would not constitute a bar to a subsequent prosecution for the misdemeanor in the justice's court; in other words, that a person may be subject to two separate prosecutions, in different courts, for precisely the same act. I cannot think this was intended.

2 Cal. Unrep. 351

PEOPLE v. DWYER. (No. 9,555.)

Filed July 28, 1884.

INTOXICATING LIQUOR—AUTHORITY OF BOARD OF SUPERVISORS.

Judgment reversed and cause remanded, on the authority of *Ex parte Walters*, 3 PAC. REP. 894, holding that boards of supervisors have power to regulate the sale of spirituous liquors within their counties by imposing a license on the sale of such liquors at retail.

Department 2. Appeal from the superior court of Sacramento county.

The facts in this case are the same as in *Ex parte Walters*, 3 PAC. REP. 894.

Henry Edgerton and *Matt. F. Johnson*, for appellant.

A. L. Rhodes, *E. J. Pringle*, and *Milton E. Babb*, for respondent.

BY THE COURT. On the authority of *Ex parte Walters*, 3 PAC. REP. 894, judgment reversed and cause remanded.

65 Cal. 472

STODDARD v. WILLIAMS and others. (No. 9,259.)

Filed July 28, 1884.

COUNTY RECORDER—FEES—LIABILITY OF COUNTY CLERK.

The statute having provided for a recorder of Santa Barbara county, the plaintiff, being the duly-elected recorder, was legally entitled to the fees of such office; and where the elected county clerk had attempted to exercise such office, he was liable to the recorder for such fees as he might have collected thereby, and he could not relieve himself therefrom by returning such fees into the county treasury; and though such disposition was made of such fees, plaintiff was entitled to recover the same.

Department 1. Appeal from the superior court of Santa Barbara county.

J. J. Boyce, for appellants.

J. F. Richards, for respondent.

McKEE, J. As the duly-elected recorder of Santa Barbara county, the plaintiff was legally entitled to the possession of the office of recorder, and to collect and receive the fees of the office. The defendant, by virtue of his being county clerk of the county, had no valid claim to the office, and no right to collect the fees. *People ex rel. v. Williams*, 12 Pac. C. L. J. 50. When, therefore, the defendant exacted the fees in controversy, to which he had no right, he was bound to return them to the officer who was entitled to them. He could not relieve himself of that duty by turning them into the county treasury, under the statute of 1878. That statute did not authorize such a disposition of the fees of the recorder's office. It applied only to the fees collected by the county clerk for services rendered by him in his several official capacities. St. 1875-76, p. 212. But the county clerk had no official capacity as county recorder. The recorder's office was not an appendant of the county clerk's office; it was a distinct and independent office, in which no services were required of the county clerk for which he could legally charge or collect fees for himself or the county. He had, therefore, no duty to perform with reference to them.

The fees of the recorder's office were, therefore, not subject to the statute of 1878. The only statute applicable to them was the general fee-bill, (St. 1869-70, p. 148,) and under the provisions of that law the plaintiff was entitled to receive them as compensation for his services as county recorder. Section 1, *supra*.

Judgment affirmed.

We concur: ROSS, J.; MCKINSTRY, J.

65 Cal. 476

COUNTY OF LOS ANGELES v. CITY OF LOS ANGELES and another.
(No. 9,478.)

Filed July 29, 1884.

1. JUSTICE OF PEACE—PAYMENT OF FEES INTO CITY TREASURY.

Section 103, Code Civil Proc., as passed in 1880, relative to payment of fees collected by justices of the peace into the city treasury, is not in conflict with sections 1570 and 1457, Pen. Code, providing for the payment of fines and forfeitures collected by such justices into the county treasury.

2. SAME—MAYOR EX-OFFICIO JUDGE OF CITY COURT—DEPUTIZING JUSTICES.

Where the mayor of the city was by the charter constituted *ex officio* judge of the city court, with power, in case of absence from the city or inability to act, to deputize any justice of the peace in the city to act for him, and the fines collected by the mayor as such *ex officio* city judge were payable into the city treasury, a general deputation and substitution of all the justices to act, not for a temporary cause or inability on the part of the mayor, but only upon the ground that he could not perform the judicial functions of the office without neglecting some other duties pertaining to the office, carried with it no authority to act.

3. SAME—PAYMENT OF FINES INTO CITY TREASURY—RIGHT OF COUNTY TO RECOVER AMOUNT PAID.

As the justices of the peace did not attempt to act under the deputation, nor preside in the trial of the cases in question, as police judges, but as justices of the peace, but by mistake paid the moneys collected for fines and forfeitures into the city treasury when they should have been paid to the county, the latter is entitled to recover such from the former.

In bank. Appeal from the superior court of Los Angeles county.
S. M. White, for appellant.

W. S. Stephenson and *J. F. Godfrey*, for respondent.

McKEE, J. By a statute passed April 1, 1880, relative to the courts of justice of the state and the various officers connected therewith, it was provided that in every city of the state having 10,000 and not more than 20,000 inhabitants there shall be elected one justice of the peace, to whom shall be paid a salary of \$2,000 per annum, payable out of the general fund in the city treasury. It was also provided that the justices should collect all the fees chargeable by law for services rendered by them, and report under oath, on the first Monday in every month, the amount of said fees to the treasurer of the city, and pay the same into the treasury of the city, to the credit of its general fund. St. 1880, p. 77, § 103; *Coggins v. Sacramento*, 59 Cal. 599. Under that statute a justice of the peace who had been elected in and for the city of Los Angeles, between January, 1880, and January, 1883, and his successor in office since January, 1883, collected fines imposed and forfeitures incurred in cases tried and determined by them, respectively, for violations of the laws of the state and of the city; and each reported to the treasurer of ordinances of the city the amount he had received, and paid the same into the city treasury. The fines and forfeitures thus collected and paid over to the city treasury aggregated the sum of \$11,605, about one-half of which, it is stipulated, were imposed or incurred for viola-

tions of state laws, and the other half were imposed as fines for violating city ordinances.

The county of Los Angeles claims to be entitled to this money. Her contention is that the justices of the peace were required by law to pay all fines and forfeitures collected by them into the county treasury. The contention seems to be well founded. Section 1570 of the Penal Code provides:

"All fines and forfeitures collected in any court, except police courts, must be applied to the payment of the costs of the case in which the fine is imposed or the forfeiture incurred, and after such costs are paid the residue must be paid to the county treasurer of the county in which the court is held."

Section 1457 also provides:

"Upon payment of a fine before or after commitment, * * * the money must be applied to the payment of the expenses of the prosecution, and the residue must be paid over within ten days to the county or city treasurer, according as the offense is prosecuted in a justice's or police court."

These sections of the Code were not expressly repealed by the statute of 1880, nor were they repealed by implication, for between their provisions and those of the statute there is no inconsistency. The sections were therefore in force at the time of the collection of the fines and forfeiture in controversy, and they constituted the law regulating their disposition. Under that law the duty was imposed upon officers collecting fines and forfeitures to pay them, in the manner prescribed by the law, into the county treasury; and the penal law enforced that duty by declaring that the officer who refused or neglected for 30 days, after collecting such fines or forfeitures, to pay over the same according to law, was guilty of a misdemeanor. Pen. Code, § 427.

The statute of 1880 and sections 1457 and 1570 must, however, be read together, because they not only regulate the duty of justices of the peace as to the disposition of the fines and forfeitures collected by them, but also as to the disposal of the fees of the justices, in cases in which the fines were imposed or the forfeitures incurred. If the one was imposed or incurred without costs, or with costs which were not collected, it is made the duty of the officer to collect the costs out of the fines or forfeitures paid to him, and to report the amount of his fees to the city treasurer and pay it into the city treasury, as required by the statute of 1880, and pay over the residue into the county treasury as required by sections 1457 and 1570, *supra*. But if the fine was imposed or the forfeiture incurred with costs, and the fine or forfeiture with costs were paid, then the entire fine or forfeiture is to be paid into the county treasury, and the fees of the justice are to be paid into the city treasury.

The moneys in controversy seem to have been received in the latter class of cases, for the fact is admitted that they were received by the officers "in addition to the sums properly applicable to the payment of the costs of the cases in which such fines were imposed or

such forfeitures incurred, and in addition to all fees which are by law chargeable for services rendered by the parties." But it is insisted that one-half of these moneys were collected in cases prosecuted in the police court of the city for violating the ordinances of the city, and that these were legally paid into the city treasury. This contention is founded upon the provisions of the city charter, which constitutes the mayor of the city *ex officio* judge of the city court, with the criminal jurisdiction of a justice of the peace within the city limits, and authorized him, in case of absence from the city or inability to act as city judge, to deputize any justice of the peace in the city to act for him in his place, as judge of said court, and to exercise his powers and perform his duties; and one of those duties was to pay all fines collected by him as city judge into the treasury of the city, to the credit of the salary fund thereof. Sections 10, 11, 12, 13, and 15, art. 5, Charter 1878. Assuming to act under these provisions, the mayor of the city did, by a general deputation, substitute each of said justices to act for him "in his place and stead as the judge of the city court." And "whenever proceedings were had before either of said justices for violating the ordinances of the city, each styled himself and claimed to act as 'justice of the peace of Los Angeles city, and *ex officio* judge of the city court thereof,' and were so designated in all processes issued in said cases." As, however, the deputation was not made for any temporary cause, nor inability to act, but was made generally, and upon the only ground "that the mayor could not perform the judicial functions of the office without neglecting some other duties pertaining to the office," it carried with it no authority to act. The mayor could not, by a general deputation, delegate to others judicial powers devolved upon him by the charter. Besides, the justices did not, so far as appears by the record, attempt to act under the deputation; for, although each styled himself a justice of the peace of Los Angeles city, and *ex officio* judge of the city court thereof," there was no such judicial officer known to the law. Moreover, neither presided, in the trial of the cases in which the fines were imposed, in the capacity of a police judge. Each held a justice's court, in which, as justice of the peace, he exercised the criminal jurisdiction appertaining to his court, and imposed the fines for offenses prosecuted therein; and when these fines were paid to him he received them, not as a police judge, but as a justice of the peace; and in that capacity he was bound to make such disposition of them as was authorized by the law under which they were imposed and collected. They were not so disposed of. Under a mistaken belief that they were legally liable to pay over these fines into the city treasury, the officers reported and paid them to the city, and the city treasurer, doubtless, received them under the same mistake. But this disposition of them was not authorized by law; and as the city, by the mistake of its officers in the performance of their duty, has obtained money which, under the law, ought to have been paid into the

county treasury, it ought not, in justice, to be kept; it is the duty of the city to refund it. "If," says Mr. Justice FIELD in *Argenti v. San Francisco*, 16 Cal. 255, "the city obtain money of another by mistake or without authority of law, it is her duty to refund it; not from any contract entered into by her on the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial."

It follows that the action in hand is maintainable by the county, and that, upon the facts of the case as averred and stipulated, the court below erred in sustaining the demurrer.

Judgment reversed and cause remanded, with direction to the court below to overrule the demurrer.

We concur: MYRICK, J.; SHARPSTEIN, J.; ROSS, J.; MCKINSTRY, J.

2 C.L. Unrep. 352

COUNTY OF LOS ANGELES *v.* MORGAN. (No. 9,479.)

Filed July 29, 1884.

JUDGMENT—REVERSAL.

On authority of *Los Angeles Co. v. City of Los Angeles*, ante, 453, judgment reversed and cause remanded.

In bank. Appeal from the superior court of Los Angeles county.

The facts and questions involved in this case are the same as in *County of Los Angeles v. City of Los Angeles*, ante, 453.

S. M. White, for appellant.

John F. Godfrey, for respondent.

BY THE COURT. Upon authority of *County of Los Angeles v. City of Los Angeles*, ante, 453, judgment reversed and cause remanded, with direction to the court below to overrule the demurrer.

Cox *v.* O'NEIL and another. (No. 9,285.)

Filed July 29, 1884.

PRACTICE—VACATING JUDGMENT—NEW TRIAL—SURPRISE—NEWLY-DISCOVERED EVIDENCE.

No surprise on the part of defendants being shown from the facts, and no new evidence being produced, the orders denying a motion to vacate judgment on the ground of surprise, and denying a motion for a new trial on the ground of newly-discovered evidence, were properly made, and are affirmed.

Department 1. Appeal from the superior court of Santa Barbara county.

Joseph D. Redding, for appellant.

W. C. Stratton, for respondent.

By THE COURT. 1. There is no error in the judgment roll in this case of which we can take cognizance.

2. There is no reviewable error in the order denying the motion made in behalf of the defendant to vacate the judgment on the ground of surprise. The motion was not supported by the affidavit of the defendant; it was made solely upon the judgment roll and the affidavit of defendant's attorney, in which he deposed that *he* was prevented by mistake and surprise from appearing in court to attend to the trial of the case on the day that the case was set down for trial. But there is nothing in his affidavit, especially when considered in connection with the counter-affidavit of the plaintiff's attorney, which shows either mistake or surprise on the part of the attorney, caused by any act of the plaintiff or of his attorney, which prevented him from being present in court on the day of the trial. On the contrary, it appears that the attorney, in the exercise of ordinary prudence, could have been present, and that his non-attendance was not due to any fault or omission of duty on the part of his adversary. Under these circumstances, there was no legal mistake or surprise for which the judgment could have been set aside. *Haight v. Green*, 19 Cal. 113; *Mulholland v. Heyneman*, Id. 605; *Ekel v. Swift*, 47 Cal. 619.

3. There was no error in denying the motion for a new trial made on the ground of newly-discovered evidence. The motion was not supported by the affidavit of the defendant, nor of any witness who would testify to the alleged newly-discovered evidence. Besides, the evidence itself only tended to prove a fact which was at issue in the case, and which was proved on the trial; and as the defendant was absent from the trial without legal excuse, the evidence alleged to have been discovered since would have been of no avail to him had he known of it before the trial.

Judgment and orders affirmed.

COX v. IRELAND. (No. 9,284.)

Filed July 29, 1884.

JUDGMENT—AFFIRMANCE.

On authority of *Cox v. O'Neil*, ante, 456, judgment and orders affirmed.

Department 1. Appeal from the superior court of Santa Barbara county.

The facts in this case are the same as in *Cox v. O'Neil*, ante, 456.

Joseph D. Redding, for appellant.

W. C. Stratton, for respondent.

By THE COURT. On the authority of *Cox v. O'Neil*, ante, 456, judgment and orders affirmed.

(65 Cal. 482)

JOHNSON v. KIRBY and others. (No. 9,406.)

Filed August 1, 1884.

1. TRUST—AGREEMENT AS TO STOCK—BREACH OF CONTRACT.

One of defendants, in consideration of a transfer of stock to him, contracted to do certain work, or, on failure to complete the contract, to retransfer such stock. On failure to comply with such contract defendant was bound to reassign such stock, and became the trustee of such stock for the benefit of plaintiff, who was the successor in interest of the person from whom defendant obtained title.

2. SAME—ACTION TO RECOVER STOCK—CORPORATION AS PARTY.

In an action to recover stock claimed to be unlawfully held and transferred, the corporation is a proper party defendant to compel a transfer on its books to plaintiff and the issuance of a certificate of shares to him, to which, under the facts alleged, he is entitled.

3. SAME—PURCHASE WITH NOTICE OF TRUST.

Persons who obtain stock by purchase, with notice of facts charging their assignor as trustee of such stock, are proper parties defendant in an action to recover the stock from such trustee.

4. SAME—PLEADING—DEMURRER—WHAT ADMITTED BY—AVERMENTS AS TO ASSESSMENTS.

A demurrer admits only such facts to be true as are well pleaded. It does not admit matter of law or legal conclusions. To aver that an assessment is void, without averring the facts constituting the invalidity, is pleading a legal conclusion.

5. SAME—PARTIES.

A person who it is alleged fraudulently procured an assessment to be levied is not properly joined in an action to recover stock from persons who purchased from the company which obtained title by purchase under an assessment sale, which does not appear to have been invalid.

6. SAME—JOINDER OF CAUSES OF ACTION.

Causes of action which do not affect the same parties cannot be properly united.

Department 1. Appeal from the superior court of Nevada county.

Cross & Simond, for appellant.

Lloyd & Wood, for respondent.

THORNTON, J. Appeal by plaintiff from judgment. The action was against Charles K. Kirby, the Mount Auburn Gold Quartz Mining Company, Maltby G. Lane, and Richard H. Lane. The court sustained the demurrer of defendant Kirby, of defendant the Mount Auburn Gold Quartz Mining Company, and of defendants M. G. Lane and R. H. Lane, to the complaint, on the ground of misjoinder of parties defendant, and on the further ground that several causes of action have been improperly united.

Whether the court ruled correctly on these demurrers is the question to be considered and determined. It is averred in the complaint that Solomon Johnson was, on the eighteenth of August, 1879, the owner of 29,000 shares of the capital stock of the quartz company above mentioned, (the whole of the stock of this company was divided into 30,000 shares;) that on that day he entered into a contract in writing with defendant Kirby, by which it was agreed that in consid-

eration of the terms, covenants, etc., of a contract thereafter to be entered into with the above-named quartz company and Kirby, whereby the latter binds himself to sink a main working shaft upon the Mount Auburn gold quartz ledge to the depth of 400 feet, and to drive certain drifts, etc., and in further consideration of the sum of \$1,000 received from Johnson, the latter sold and assigned to Kirby 16,000 shares of the stock above mentioned, and transferred these shares to the latter on the books of the defendant company. It was further agreed between the parties that if Kirby should discontinue the above-mentioned work and abandon its prosecution, that he should retransfer to Johnson the aforesaid 16,000 shares of stock.

There are other terms in this contract, but they have no reference to the matters in dispute here.

The pleader then proceeds to set out the contract in writing between the defendant corporation and Kirby, above referred to, by which the latter agrees to do the work above stated, in consideration of the rock and ore which he may obtain and take from the mine in doing the aforesaid work on it; the company to be at no expense for doing said work further than the rock and ore above referred to. It is further agreed that Kirby may discontinue the work whenever he chooses, without any liability for damages to the company for non-completion of the work.

In pursuance of Johnson's agreement with Kirby, the former assigned and transferred to Kirby, on the books of the company, the 16,000 shares of stock aforesaid. Kirby commenced the work, did not complete it, afterwards abandoned it, and refused to perform it, whereby it is averred Kirby became liable to reassign and retransfer the shares aforesaid to the successor in interest of Solomon Johnson.

It will be observed that the above relates to the 16,000 shares of stock sold, assigned, and transferred by Solomon Johnson to defendant Kirby.

The pleader then proceeds to aver that by the assignment of the 16,000 shares of stock to Kirby, the latter became the owner of a majority of the stock of the corporation defendant, and thereby acquired control of its affairs and officers; that he (Kirby) elected, or caused to be elected, new officers, who were under his control, and caused the corporation to acknowledge full performance of the contract with it, when in fact only a small portion of the work required by it had been done, and by virtue of his control of the affairs of the corporation, obtained as above stated, caused and procured an assessment to be attempted to be levied of 25 cents a share on its stock; that a notice of this assessment was published, and thereafter a notice of sale of the 13,000 shares of the stock of Solomon Johnson was published and sold by the corporation to pay said pretended assessment, and bought by it on the twenty-sixth of July, 1880; that thereafter the corporation sold the 13,000 shares to defendants Maltby G. Lane and R. H. Lane, and to other parties whose names are un-

known to plaintiff, or caused a stock dividend to be made, "and caused the same to be transferred on the books of the company, and thereby Kirby became possessed of the benefits of said stock;" that this assessment was void; that it was levied for the purpose of paying Kirby the costs and expenses incurred by him in doing the work upon the mine, which Kirby had agreed to do in consideration of the shares of stock assigned to him by Solomon Johnson; that on the eighteenth day of May, 1880, Solomon Johnson died; that up to the time of his death he was the owner of said 13,000 shares of stock, and of the reversionary right expressed in his contract to the 16,000 shares transferred to Kirby; that the value of all the foregoing stock is, and ever since the making of the contract between Kirby and Johnson has been, two dollars per share; that Solomon Johnson died testate, and under his will all his rights in and to all of said shares of stock have vested in the plaintiff.

As to this investiture of rights in the plaintiff, full averments are made. The legal effect of these only is stated above. As no question arises on them, it is unnecessary to state them more fully.

It is further alleged that the defendant corporation and its officers refuse to acknowledge the plaintiff as having an interest in the stock of the company; have canceled the certificates issued to Solomon Johnson, and in lieu thereof have issued certificates of stock to defendants M. G. Lane and R. H. Lane, and other parties whose names are unknown to plaintiff; that M. G. and R. H. Lane are in possession of, and pretend to be the owners of, the certificates of stock issued in lieu of the 13,000 shares and of the 16,000 shares above mentioned, and are by the company recognized and treated as the owners of the said shares; that the Lanes took this stock with a full knowledge of all the facts hereinbefore stated, and that plaintiff is the rightful owner thereof; that Kirby has done all the acts herein alleged, since the making of the two contracts in writing above stated, for the purpose of defrauding Solomon Johnson and his successors in interest of their rights to and in this stock, and that thereby plaintiff has suffered damage in the sum of \$56,000.

The prayer is that Kirby be adjudged to reassign to plaintiff all the certificates and shares of stock owned by him or under his control, formerly the property of Solomon Johnson; that the Lanes be likewise adjudged to reassign the shares held by them to plaintiff, and that the company be decreed to enter upon the proper books the plaintiff as owner of such shares, and issue to him certificates therefor; that if such relief cannot be had, that then the plaintiff recover from defendant Kirby such sum of money in damages as he may be entitled to, and for other and further relief.

The facts set forth as above detailed relate to a transaction in regard to 16,000 shares of stock and another one in regard to 13,000 shares. These shares are all stock of the same company, the corporation defendant. As to the transaction in regard to the 16,000 shares, the

title passed to Kirby under the contract with Solomon Johnson. It is so distinctly expressed, as will be seen above. Not having complied, and having refused to comply, with his contract with Solomon Johnson, he was bound to reassign to Johnson. After his non-compliance he became a trustee as to such stock for Solomon Johnson, and the plaintiff holding under him as his successor. As the Lanes claim to own this stock and are in possession of the certificates of these shares, and as the defendant corporation has allowed these shares to be transferred on their books to Kirby, has canceled the certificates of these shares to Johnson, recognize and treat the Lanes as the owners of them, and refuse to recognize plaintiff's rights in them as successor of Solomon Johnson, we think the Lanes and the corporation are proper parties defendant with Kirby to this action as regards the 16,000 shares. If the Lanes became the owners of these shares by purchase, they became so with notice of all the facts which charged Kirby as trustee, and therefore they may be joined with Kirby as defendants. Perry, Trusts, § 877; *Putnam v. Lamphier*, 36 Cal. 153, 158. The corporation is a proper party defendant to compel a transfer on its books to plaintiff, and the issuance of a certificate of the shares to him, to which under the facts alleged he is entitled. But, as to the 13,000 shares, it appears that they were sold by the company for non-payment of an assessment, were purchased by the company, and by it sold to the Lanes. The Lanes are charged to have purchased this stock of the company with full knowledge of the facts in relation to the levy of the assessment under which it was sold and purchased by the corporation, and also of the fact that this assessment was levied for the purpose of paying to Kirby the costs and expenses incurred by him in doing the work on the quartz ledge above stated, for which nothing was due him. It does not appear that this purpose of paying Kirby was carried out. It is not averred that any money realized on this sale or purchase by the Lanes was paid to Kirby. It may have been used for the legitimate purpose of having the mine worked, or of paying the debts of the company. We cannot say or hold that levying an assessment to pay a debt which the corporation did not owe, and selling stock for such purpose, especially when it does not appear that the money was so used, is a fraud.

It is also averred that this assessment was not levied in accordance with law, and is void; but the defendants insist that it is valid, and treat it as valid. The pleader does not state any fact showing or tending to show that the assessment was not made in accordance with law, or that it is not valid. It is stated in the complaint as matter of law—as a legal conclusion. A demurrer only admits such facts to be true as are well pleaded. It does not admit matter of law or legal conclusions. Such averment, then, goes for nothing. We cannot take it into consideration in deciding the questions in this

cause. Nor can we take into consideration the averment that the company sold the 13,000 shares of stock to the Lanes, and thereby Kirby became possessed of the benefits of this stock. It is not alleged in what mode he became possessed of these benefits. It is not averred that the Lanes were Kirby under another name; that they were in fact Kirby himself. It is not stated that Kirby became in any way the owner of the shares, but became possessed of benefits. What these benefits are does not appear. That he became possessed of benefits is a legal conclusion. No facts are alleged, and therefore none are admitted by the demurrants.

After the averment of knowledge on the part of the Lanes, there is an averment that all the acts of Kirby, subsequent to the making of the two contracts in writing, were performed with the intent to defraud Solomon Johnson and his successors in interest of the shares of stock above mentioned; but there is no allegation that the Lanes knew of such intent, or colluded with him to carry it into execution. Nor is it averred that the Lanes bought this stock (the 13,000 shares) with intent to defraud any one. Under these circumstances the Lanes are purchasers of this stock from the company, who purchased under an assessment which does not appear to have been invalid. They are not purchasers from Kirby, and if Kirby acted with fraudulent intent, it does not appear that they knew of it. We cannot, then, see that Kirby has any connection with the Lanes in this transaction, or that he is a proper party to any suit against the Lanes in regard to it. Kirby is therefore improperly joined as a party defendant with the Lanes and the corporation defendant in the suit, as regards the transaction relating to the 13,000 shares. As it is sought to compel the corporation to enter plaintiff on its books as owner of these shares, and to issue to him a certificate therefor, we think the company is properly made a defendant with the Lanes, as regards the action against them.

As Kirby is improperly joined as a defendant in regard to the 13,000 shares, two causes of action are improperly united, viz., one relating to the 16,000 shares of stock, and another relating to the 13,000 shares. As the causes of action do not affect the same parties they cannot be properly united. Code Civil Proc. 427.

We cannot hold, with the contention of counsel for appellant, that Solomon Johnson placed the franchises of defendant corporation in Kirby's hands *in trust* for any purpose whatever. We find no such declaration of trust averred, nor can we perceive, from the allegations of the complaint, that any such trust arose by operation of law. Moreover, Solomon Johnson was not the owner of such franchises, and could not convey or assign them in trust. His ownership of a majority of the stock did not make him the owner of such franchises. If such fact made him the owner of the franchises, an owner of the majority of the stock of a corporation would be a trustee of the other

stockholders. We know of no rule of law that would justify any such conclusion.

Judgment affirmed.

We concur: MYRICK, J.; SHARPSTEIN, J.

65 Cal. 481

JOHNSON v. SUP'RS SACRAMENTO CO. (No. 9,419.)

Filed July 31, 1884.

JUDGMENT AGAINST COUNTY—DEFENSE—MANDAMUS.

A proceeding by *mandamus* is proper to compel a board of supervisors of a county to allow the amount of a judgment, and the defense that the payment of such judgment will result in incurring indebtedness exceeding the income of the then current fiscal year, cannot be set up in such proceeding; if it existed, it should have been interposed in the action in which the judgment was rendered.

Department 2. Appeal from the superior court of Sacramento county.

A. P. Catlin, for appellant.

A. M. Johnson, for respondent.

BY THE COURT. This was a proceeding by *mandamus* to compel the payment of a judgment which the petitioner had recovered against the county. The defense set up is that the payment of the judgment will result in incurring indebtedness and liability exceeding the income of the county for the then current fiscal year, and that the board has no authority to provide for the payment of such excess from the revenue of the ensuing fiscal year. If such a defense had existed, the proper place to interpose it would have been in the action in which the judgment was rendered. For aught that appears, that defense may have been there interposed by answer, and the issue tried and decided adversely to the county.

The order appealed from directed that the respondent be required to allow and pay the amount of the judgment. The order to allow is correct, but the board of supervisors does not pay demands; the treasurer is to pay; and it may be that when the warrant shall be presented there will not be sufficient money in the proper fund for the year.

The order is modified by striking out the words "and pay," and in all other respects it is affirmed.

65 Cal. 481

HIATT *v.* BOARD OF TRUSTEES OF MERIDAN SCHOOL-DIST. (No. 9,523.)

Filed July 31, 1884.

1. PRACTICE AND PROCEDURE—APPEAL—DENIAL.

Where, on the trial, a denial is treated as sufficient, and no objection made thereto, on appeal it will be treated as good and sufficient.

2. SAME—FINDINGS—JUDGMENT.

Findings and conclusions *held* sufficient to sustain the judgment.

Department 2. Appeal from the superior court of Sutter county.

W. B. Treadwell, for appellant.

M. E. Sanborn, for respondent.

BY THE COURT. *Mandamus* to compel the respondent to levy a tax. Conceding that the denial by the respondent of petitioner's allegation of demand and refusal to levy the tax was informal, yet no point seems to have been made thereon at the trial, and it would appear that the parties proceeded with the trial as if the denial was sufficient. The petition was verified, and there was a general denial as well as an attempt at a special denial. Under such circumstances, it has been held that we would treat the denial as the parties treated it—sufficient. The findings of fact and the conclusions are sufficient to sustain the judgment. We see no error.

Judgment affirmed.

SUPREME COURT OF CALIFORNIA.

67 Cal. 547

HIBBERD and others v. SMITH and others. (No. 7,275.)

Filed July 30, 1884.

1. DEED—DELIVERY—INTENT.

Until delivery of a conveyance, with intent that it shall operate as a deed, it does not take effect; such intent may be a question of fact, to be ascertained from the circumstances.

2. SAME—ASSENT OF GRANTEE.

The assent of the grantee is a necessary element to the delivery of a deed, whether the delivery be actual or constructive.

3. SAME—DELIVERY TO THIRD PARTY.

Delivery to a stranger, for a third person, of an intended deed, of which delivery such third person is not informed, does not, by relation, when such third person accepts the deed, operate to defeat a right acquired under a judgment lien against the grantor between the time of delivery to the stranger and acceptance by the grantee.

4. SHERIFF'S SALE—TITLE—RETURN OF WRIT—DEED.

The title of a purchaser at a sheriff's sale does not depend on the return to the writ; he cannot be prejudiced by its terms, whether good or bad, sufficient or insufficient. The title acquired by the deed of the officer relates back to the date of the judgment, and not to the date of any real or pretended statutory levy.

In bank. Appeal from the superior court of Alameda county.

J. W. Dwinelle, T. H. Hittell, and M. G. Cobb, for appellants.

J. P. Hoge and A. A. Cohen, for respondents.

THORNTON, J. This action, in our ordinary legal nomenclature, is ejectment, to recover possession of a parcel of land situated in Alameda county. Judgment went for plaintiffs. Motion for a new trial by defendants was by order denied, and the defendants appealed from the judgment and order.

The main question discussed on the argument in this court relates to the delivery of a written instrument under seal, bearing date sixth of January, 1855, purporting to have been made by William W. Chipman to Edward S. Chipman, and to convey the land in controversy. As to this point the court below found the following facts:

"That on the sixth day of January, 1855, said William W. Chipman signed and sealed a paper purporting to be a deed of grant, bargain, and sale to his brother, Edward S. Chipman, thereby purporting to convey the land described in the complaint in this action, and on the same day last named acknowledged the same in due form of law before William Hamilton, a justice of the peace of said county, and thereupon left said deed with said justice of the peace until the same was handed to Gideon Aughinbaugh. The consideration mentioned in said deed was \$5,000, and other valuable considerations; but in fact nothing was paid by said Edward S. Chipman to said William W. Chipman as the consideration for said conveyance, but said William W. Chipman was, at the time of the making of said deed, indebted to said Edward S. Chipman. At the time of making and depositing said deed with said justice, the grantee therein named, Edward S. Chipman, was a resident of Holmes

county, in the state of Ohio, and had been such resident there for six months previously, and had no knowledge of the making of such conveyance to him until after the thirtieth of June, 1855. Nor was the same ever delivered before that time to any person authorized or empowered by him to receive it. Nor did he ever before that time assent to the said conveyance to him. Said Aughinbaugh, at the time he received said deed from said justice, had no authority or power from said Edward S. Chipman to receive the delivery thereof for him, nor had he ever any such authority or power.

"That afterwards, and prior to February 22, 1855, Edward S. Chipman, the grantee in said deed, then being in the state of Ohio, said grantor, Wm. W. Chipman, requested the said Gideon Aughinbaugh, who was an acquaintance and friend of said Edward S. Chipman, to go to the office of said justice of the peace, Wm. Hamilton, and to get the said deed, and to hold the same for Edward S. Chipman, at the same time stating to said Aughinbaugh that the law required that the said deed should be delivered to somebody for the grantee to make it a valid conveyance, as he, the grantee, was absent. In pursuance of such request the said Gideon Aughinbaugh called at the office of said justice, asked for and received said deed from him prior to February 22, 1855, and held the same in his possession for Edward S. Chipman, but without the knowledge or authority of said Edward S. Chipman. About two weeks afterwards, said grantor, William W. Chipman, called upon said Aughinbaugh for said deed, asking that he might take it to get it recorded, which he accordingly did, and the same was duly recorded at the request of said William W. Chipman in the county recorder's office of Alameda county on the fifteenth day of March, 1855. Said deed was delivered by the said William W. Chipman to the said Aughinbaugh, and was thereby intended by the grantor, William W. Chipman, as a delivery to and for the use and benefit of Edward S. Chipman, without condition or qualification. That afterwards, June 30, 1855, the said Edward S. Chipman returned from the state of Ohio to California, and shortly afterwards took said deed into his own possession, and made several conveyances of parcels of the land described therein to other parties, for full value, as elsewhere in these findings stated."

Other facts found by the court which bear on this question of delivery are as follows: That on the first day of March, 1855, the plaintiff Hibberd recovered in the district court for Alameda county judgment for the possession of a tract of land in the county of Alameda against W. W. Chipman and Gideon Aughinbaugh, and damages for withholding this land amounting to \$8,600, and \$536.55 costs of suit, which judgment was duly entered of record and docketed in said court on the first day of March, 1855. On appeal, this judgment was affirmed, with costs, at the April term, 1856, and the *remittitur* was filed in the district court last above named on the twenty seventh of March, 1856. The plaintiffs claim the land in suit under an execution sale on this judgment, having been the highest bidders for the same, for the sum of \$1,200.

It will thus be seen that both parties claim under W. W. Chipman; the plaintiffs under the judgment execution sale and sheriff's deed above mentioned, and the defendants under the alleged deed to E. S. Chipman.

The court also found as a conclusion of law that the paper purporting to be a deed, just above stated, was, under the circumstances set forth in the foregoing findings of fact, void for want of a valid delivery,

as against the title acquired by plaintiffs under the judgment above mentioned by sheriff's sale, "as set forth in said findings of fact." The reference here is to the findings above stated.

The act, solemn and authentic, done in writing in form apt for the conveyance of land, with signature and seal, does not take effect as a deed until delivery with intent that it shall so operate. The elements going to make up such a paper all constitute an act, *factum*, or deed, but not complete until the paper has been delivered with the intent above mentioned. The intent with which it is delivered is all-important. This restricts or enlarges the effect of the instrument. It may be delivered to another person as a mere custodian, or to such person to be kept by him and delivered to a third person on a condition performed or the happening of a certain event, or it may be delivered that it may have full operation as the deed of the party delivering it. This may be done in various modes. It is impossible to state, *a priori*, in exact terms what shall or shall not constitute a delivery that the paper may have its full operation as a deed. It is, to a great extent, a matter of fact, depending upon intent, and, under such circumstances, the intent, as evidencing what the maker of the instrument meant to do, must be found from the circumstances of the transaction—the *res gestæ*; and while some general rules may be and are laid down in regard to it, to ascertain such intent, the intent must be found as a fact, and cannot always be determined as matter of law. There are some cases in which the intent is so plainly indicated by the *res gestæ* that but one conclusion can be deduced. Take the case of the delivery of such an instrument to a third person as a mere custodian for the party giving it, its solution is plain, that there is no delivery of the paper to make it operative as a deed. Take another case of such a paper handed by the grantor to the grantee, with the declaration, this is my act and deed, a delivery would be so plainly intended that no other conclusion could be reached. A third case of the delivery of such an instrument by the maker to a third person, with directions to keep it and hand it to a person named as grantee in it, on the payment by him of a sum of money, the payment of the sum of money, and the tradition of the paper as directed having been made, no other result could be reached than that the paper became by such delivery an operative conveyance. These cases are simple; but in other cases, where the intent is to be inferred from circumstances in their very nature equivocal, the solution as to delivery or not becomes one of difficulty, and depends so much on the subjective state of the mind of person or persons trying the issue produced by the evidence of the attending circumstances that the law can lay down no certain rule on the subject. It then becomes a question of fact, and if there is evidence tending to sustain the finding of the court *a quo*, this court will not disturb it.

This is settled, that delivery is not complete until the person delivering (grantor) has so dealt with the instrument delivered as to

lose all control over it. And whether he has so dealt with the instrument depends upon the intent to be deduced from all the surrounding circumstances—the *res gestæ*.

And this is all that is determined in *Hastings v. Vaughn*, 5 Cal. 318. The case, as reported, is a singular one, and we should infer from the report that it is inaccurate. The case as stated by the reporter is this: It was an action of ejectment against Vaughn and Shirley to recover possession of a lot in the city of Benicia. Shirley answered, disclaiming all interest, (it had not then been decided that such a defense was of no avail in the action of ejectment,) and Vaughn answered, denying generally the allegations of the complaint. The mayor and common council of Benicia intervened, and claimed title to the lot in suit through a deed from Malinda Cooper and her children, who claimed under a deed from Stephen Cooper. This latter deed was drawn in the usual form, and signed by Stephen Cooper, and opposite his name was written the word "seal." This deed had been acknowledged before and recorded in Solano county, by the county recorder for that county, but did not bear on its face his official seal. The court refused to permit this deed to be read in evidence to the jury, to which defendants excepted. The report proceeds: "The jury found that there had been a sufficient delivery, and gave a verdict for plaintiff." How a jury could find as to the delivery of a deed which had been excluded from their consideration we do not understand.

It is further stated by HEYDENFELDT, J., who delivered the opinion of the court, that the only question before the court necessary to be examined was as to the exclusion of the deed of Cooper from the jury, the court below having held that the deed was void for want of the seal of the grantor; and, *second*, that the record did not impart notice for want of the seal of the officer before whom it was acknowledged. To these objections the respondent adds, the deed was not delivered. What the respondent's objections had to do with the case it was difficult to see. Judgment had passed in his favor and he did not appeal. The court had excluded the deed because it was not sealed, and for the lack of the official seal of the recorder to the acknowledgment. It does not appear that any question as to delivery was made in the objections to the paper offered in the court below. Yet the jury, to whom it never got, passed on the question of delivery, and the court, on appeal, proceeds to pass on the same question. The decision amounts to nothing more than this, which was undoubtedly correct: that delivery depends more on intention than the mode of fulfilling the intention; that delivery is a question of fact depending on intent, to be found by the jury. If what was said is anything more than *dicta*, what is above stated is all that was decided. The *dicta*, to be sure, are clearly correct. *Garnons v. Knight*, 5 Barn. & C. 673, is only cited to establish the rule stated above, which the court says is the correct doctrine, and laid down in that case.

The court further proceeds to say of this case: "There, it was left to the jury to decide as to the intention of the grantor. Many authorities are cited, and much good reasoning brought out, in support of the position that a deed will be operative although never parted with by the person who executed it." The court also cites as sustaining the rule that delivery is a question of fact to be determined by the jury, in addition to *Doe ex dem. Garnons v. Knight, Lindsay v. Lindsay*, 11 Vt. 621; *Vanhook v. Barnett*, 4 Dev. 268; *Hannah v. Swarner*, 8 Watts, 9.

The question of delivery being one of fact, the decision of the court below that there was no delivery cannot be reversed by this court, unless, from the specific facts found, the law establishes the fact of delivery. Does the law, on the facts found, conclusively establish the conclusion that there was a delivery of the paper as a deed?

To recapitulate, the facts found are that in January, 1855, W. W. Chipman signed and sealed a paper purporting to be a deed of grant to his brother, E. S. Chipman, and on the same day acknowledged the same before one Hamilton, a justice of the peace, and left the paper with Hamilton. At the time of the happening of the aforementioned events, E. S. Chipman was a resident of Holmes county, Ohio, and had been a resident thereof for six months previously, and had no knowledge of the making of such instrument to him until after the thirtieth of June, 1855. Nor was this paper ever delivered at any time to any person authorized by E. S. Chipman to receive it. Nor did E. S. Chipman ever, prior to the thirtieth day of June, 1855, assent to such conveyance to him. That after the sixth day of January, 1855, W. W. Chipman requested Gideon Aughinbaugh to go to the office of Hamilton, the justice above mentioned, get this instrument, and hold it for E. S. Chipman, at the same time stating to Aughinbaugh that the law required that the deed should be delivered to somebody for the grantee, to make it a valid conveyance, as the grantee was then absent. Aughinbaugh, in pursuance of this request, called at the office of the justice, asked for and received the deed from him, prior to February 22, 1855, and held it in his possession for E. S. Chipman, but without the knowledge or authority of E. S. Chipman. When Aughinbaugh thus received this paper he had no authority or power from E. S. Chipman to receive the delivery thereof, nor did he ever have any such authority or power. After Aughinbaugh received this paper, W. W. Chipman called upon him and asked him for it, that he might take it to get it recorded, and it was recorded, at request of W. W. Chipman, in the proper office, on the fifteenth of March, 1855. This paper was delivered by W. W. Chipman to Aughinbaugh, and thereby intended by the grantor, W. W. Chipman, as a delivery to and for the use and benefit of E. S. Chipman, without condition or qualification. That afterwards, on June 30, 1855, E. S. Chipman returned from Ohio to California, and shortly afterwards took the deed in his possession and made conveyances of parcels of the land described therein.

From the findings above stated in the preceding portion of this opinion it appears that Hibberd's judgment became a lien on the land in controversy on the first day of March, 1855, it having been entered and duly docketed in the proper county on that day. It is further found that the consideration mentioned in the deed was \$5,000 and other valuable considerations, but in fact nothing was paid by E. S. Chipman to W. W. Chipman as the consideration of the conveyance, but that W. W. Chipman was at the time of making the deed indebted to E. S. Chipman. The facts found might justify a finding that, as between the two Chipmans, there was a delivery of the deed to E. S. Chipman. But do they show conclusively, as a matter of law, that there was a delivery as against Hibberd? Hibberd had a lien on the property as early as the first of March, 1855. It is found that the delivery was made to Aughinbaugh prior to March 1, 1855, for the use and benefit of E. S. Chipman, but at that time Aughinbaugh was not the agent of E. S. Chipman, who was absent and knew nothing of the paper until the thirtieth of June, 1855. That assent is necessary to the delivery of a deed, whether such delivery is actual or constructive, is settled law. This is plainly declared in section 1059 of the Civil Code. In section 1054 it is provided that a grant or conveyance (see section 1053) takes effect so as to vest the interest intended to be transferred only upon its delivery by the grantor. Section 1059, Civil Code, is in these words:

"Though a grant be not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered in the following cases: (1) When the instrument is, by the agreement of the parties at the time of execution, understood to be delivered, and under such circumstances that the grantee is entitled to immediate delivery; or (2) when it is delivered to a stranger for the benefit of the grantee, and his assent is shown, or may be presumed."

It is, then, a valid constructive delivery when, as in this case, it is delivered to a stranger for the benefit of the grantee, but only then when the assent is shown or may be presumed. It is contended here that the assent should be presumed, and presumed, too, as a matter of law. The delivery founded on a presumption which is matter of fact, must be found by the court below. This court cannot find facts. It can only construe facts found, and deduce from them the proper legal conclusion. The court below has found against this presumption, and unless the deductions of law to be drawn from the facts found show a presumption of assent, this court cannot reverse the judgment of the court *a quo* on this point. As between the parties to this conveyance, this presumption, it may be conceded, might be indulged. But when can it be presumed that such assent was given by the grantee? Can it be presumed that it was given before it was known by the grantee? We cannot understand that any such presumption can be sustained. It may be that if E. S. Chipman had known of the conveyance when it was delivered to Aughinbaugh, he

would have accepted it. But the question here is not what the grantee would have done, but what was done. And there is no finding of any assent here earlier than the thirtieth of June, 1855, long after Hibberd had obtained his lien by judgment. The statute (Civil Code, § 1059) does not recognize a delivery as perfected until an assent is proved, either by act or by presumption. And when reliance is placed on a presumptive assent, how can such presumptive assent be found to the delivery of a paper until all the facts are known to the grantee? In this case there is nothing found which shows that E. S. Chipman knew any of the facts until the thirtieth of June, 1855. E. S. Chipman was not bound to accept this conveyance. The law does not force a man to take an estate against his will. *Townson v. Tickell*, 3 Barn & Ald. 36; *Thompson v. Leach*, 2 Vent. 198. In this last case it was held that an estate did not pass by surrender to the surrenderee until he expressly accepted it. In *Townson v. Tickell* a devisee renounced a devise of a reversion to him, and it was held that he could do so.

It is said that the conveyance was for the benefit of E. S. Chipman, and therefore his assent must be presumed. We do not feel assured that the deed is, on its face, for the benefit of the grantee. It is not found that the purchase money was paid, or that the deed acknowledges the receipt of the sum (\$5,000) named as the consideration. Nor does it so appear in any other way. Under these circumstances, E. S. Chipman would be bound to the grantor for the sum named, and he might maintain an action for it, and sue out a writ of attachment, and seize the property of the grantee. It is not found that the deed was made to the grantee as a payment of indebtedness. If the purchase money exceed the indebtedness of the grantor to the grantee, the amount of which is not found, then the grantee would become the debtor of the grantor for such excess. Under these circumstances we do not think that we can hold that the deed is, on its face, beneficial to E. S. Chipman. And, conceding that it was beneficial, are we authorized to hold an assent to the delivery as against a creditor with a lien, at a time when the grantee was entirely ignorant of the whole transaction? It would be, in our judgment, going further than is allowed by law, to hold under such circumstances that such a lien as Hibberd procured by his judgment should be displaced by a presumed assent to a transaction of which the party invoking the presumption knew nothing until long after the lien had attached. It may be remarked here that the delivery must be complete before the lien attached, to create a superior right in Chipman. If the presumptive assent is indulged, when must such assent be held to have been given? We find no rule of law fixing the time. We know of no rule of law authorizing us to allow an assent, given on being made acquainted with the facts, a retroactive operation, so as to cut out and extinguish a right which attached between the signing

and sealing and delivery to a stranger, and the assent given when the transaction comes to the knowledge of the grantee.

The cases cited for the most part have not in them the element of an intervening right acquired against the grantor. No such element appears in *Hastings v. Vaughn*. The same may be said of *Peavey v. Tilton*, 18 N. H. 152; *Souveryby v. Arden*, 1 Johns. Ch. 254; *Taw v. Bury*, 2 Dyer, 167. In these cases the controversy was between grantor and grantee, or those claiming under them and standing in their places. In *Buffum v. Green*, 5 N. H. 80, an intervening right under the levy of an attachment was set up, and the court said that, if the land was attached before the deed was delivered, the claim under the attachment would prevail. In *Hulick v. Scovil*, 4 Gilman, 159, a great many cases on this subject are cited and reviewed. We refer the curious to the discussion of the cases therein contained. The learned judge, speaking for the majority of the court, (two justices dissented,) sums up the principles determined by the decided cases as follows:

"(1) In every deed there must necessarily be a grantor, a grantee, and a thing granted, (4 Cruise, 12;) that delivery by the grantor and acceptance by the grantee are essential to the validity of a deed; that a deed takes effect only from its delivery, and there can be no delivery without acceptance, either express or implied, delivery and acceptance being necessarily simultaneous and correlative acts. *Jackson v. Richards*, 6 Cow. 617; *Church v. Gilman*, 15 Wend. 658. Other authorities cited *post*.

"(2) Delivery may be made—*First*, to the party himself, or any other by his appointment, or to any one authorized to receive it; or, *second*, to a stranger, for and in behalf and to the use of him to whom it is made without authority, under certain circumstances. 2 Rol. 241, 42; Touchstone, 57. See *post*.

"(3) In case of delivery to a stranger, without authority from the grantee to accept, the acceptance of the grantee at the time of delivery will be presumed, under the following concurring circumstances, viz.: (1) That the deed be upon its face beneficial to the grantee; (2) that the grantor part entirely with all control over the deed; (3) that the grantor (except in case of an escrow) accompany delivery by a declaration, intention, or intimation that the deed is delivered for and in behalf and to the use of the grantee; (4) that the grantee has eventually accepted the deed and claimed under it. 4 Cruise, 34; Touchstone, 57; and other authorities, *post*." 4 Gilman, 175, 176.

The opinion shows that the last requisite mentioned, where there is a delivery to a stranger, "that the grantee has eventually accepted the deed and claimed under it," must exist before the delivery is accomplished. A presumption that the grantee will accept the deed is not sufficient to establish delivery. The presumption must be that there has been an acceptance, and the facts must authorize such a presumption to complete a delivery. See remarks in opinion reviewing *Doe ex dem. Garnons v. Knight*, 5 Barn. & C. 671, on p. 180 of 4 Gilman. There must be delivery and acceptance before the right of another has attached. An acceptance after such right has vested is not sufficient.

The cases cited and discussed in *Hulick v. Scovil* are as follows:

Bryan v. Wash, 2 Gilman, 557; *Souwerbye v. Arden*, 1 Johns. Ch. 240; *Verplank v. Sterry*, 12 Johns. 546; *Church v. Gilman*, 15 Wend. 656; *Doe ex dem. Garnons v. Knight*, 12 E. C. L. 351; S. C. 5 Barn. & C. 671; *Taw v. Bury*, 2 Dyer, 161b; *Alford v. Lea*, 3 Coke, 27; *Butler v. Baker*, Id. 26b; *Cook's Adm'r v. Hendricks*, 4 T. B. Mon. 500; *Inlow v. Com.* 6 T. B. Mon. 74; *Belden v. Carter*, 4 Day, 66; *Hatch v. Hatch*, 9 Mass. 307; *Ruggles v. Lawson*, 13 Johns. 285; *Wheelwright v. Wheelwright*, 2 Mass. 447; *Hedge v. Drew*, 12 Pick. 141; *Ward v. Lewis*, 4 Pick. 518; *Powers v. Russell*, 13 Pick. 77; *Buffum v. Green*, 5 N. H. 71; *Ward v. Ross*, 1 Stew. 136; *Canning v. Pinkham*, 1 N. H. 357; *Clarke v. Ray*, 1 Har. & J. 323; *Hughes v. Easten*, 4 J. J. Marsh. 572. The above cases are put in the opinion in a separate class from those which follow. The cases which follow, also cited and commented on, are those in which the deeds, for want of acceptance by the grantee, were held inoperative: *Fay v. Richardson*, 7 Pick. 91; *Jackson v. Leek*, 12 Wend. 107; *Herbert v. Herbert*, Breese, 282; *Jackson v. Phipps*, 12 Johns. 418; *Same v. Dunlap*, 1 Johns. Cas. 114; *Ferguson v. Miles*, 3 Gilman, 363; *Jackson v. Cordell*, 20 Johns. 188; *Maynard v. Maynard*, 10 Mass. 456; *Elsey v. Metcalf*, 1 Denio, 326.

Of a large number of these cases it may be said of the deeds involved in them, as was said in the opinion of the court in *Hulick v. Scovil*, that they "were voluntary deeds by parents settling property upon their minor children, and the benignity of construction given to them has originated, to no inconsiderable extent, in the favor with which transactions of that character, when not in fraud of creditors, are always viewed." 4 Gilman, 178. And this further remark may be made of all of them, except *Buffum v. Green*, 5 N. H. 71; *Hedge v. Drew*, 12 Pick. 141, that they were between grantor and grantee, or those claiming under them, without the intervention of any right of a third party claiming under the grantor. And in *Buffum v. Green*, *supra*, it appeared that there had been an actual delivery to one of the grantees before the levy of the attachment on the land. See 5 N. H. 80. In *Hedge v. Drew*, *supra*, the assent to the deed was also before the attachment.

That the delivery of a deed to a third person for the use of the grantee is not always a delivery from a presumed acceptance, has been asserted in cases of high authority; as in *Butler v. Baker*, 3 Coke, 26b, Lord COKE said: "If A. make an obligation to B., and deliver it to C. to the use of B., this is the deed of A. presently; but if C. offer it to B., then B. may refuse it *in pais*, and thereby the obligation will lose its force." In *Canning v. Pinkham*, 1 N. H. 357, it is said: "All that is incumbent on the grantee," (this is said where delivery is to a stranger,) "in order to perfect delivery, is that he accept or assent to what has been done by the grantor before the latter revokes his intention to convey." What is said by Lord COKE in *Butler v. Baker* seems to be in conflict with *Taw v. Bury*, and in

accordance with what is said in *Canning v. Pinkham*. If W. W. Chipman, before the assent and acceptance by E. S. Chipman, had conveyed to another, the latter would have acquired the title.

As between grantor and grantee, or those claiming under them, when the right of a third person is not involved, it may be rightly held that an acceptance or assent by the grantee to a deed delivered to a stranger for the use of the grantee, made after such tradition to a stranger, constitutes a full and complete delivery. It may be so held under the doctrine of relation. The subsequent assent or acceptance relates back to the time of such delivery to the stranger, and makes such acts contemporaneous; *i. e.*, makes such tradition to a stranger and the subsequent assent contemporaneous. The deed only takes effect from the delivery, and such delivery, when made to a stranger for the grantee's use, is only complete on acceptance by the grantee. If it is complete on delivery to the stranger, though the assent is not given until a subsequent period, it must be because by some legal rule the assent is made to relate back to the time of such delivery, and become a part of it. If the delivery is not complete until the day when assent is given, then the delivery is not accomplished until such latter date. The title, then, must be in the grantor until assent given, and he has perfect dominion over it until his grantee has signified his assent. The assent can get back to the date of delivery to the stranger only by virtue of the doctrine of relation, which is a fiction of law in which there is always equity, never working an injury, and which is never permitted or applied so as to do wrong to third persons. Broom, Leg. Max. "*In fictione juris*," etc., 128, and cases cited; *Case v. De Goes*, 3 Caines, 261; *Jackson v. Bard*, 4 Johns. 230; *Johnson v. Smith*, 2 Burr. 963; 3 Reporter, 30a; 10 Reporter, 40; *Liford's Case*, 11 Reporter, 51; *Mostyn v. Fabrigas*, Cowp. 177; *Atty. Gen. v. Kent*, 1 Hurl. & C. 28; 3 Bl. Comm. 43; *Goodsell v. Stinson*, 7 Blackf. 439; *Hulick v. Scovil*, 4 Gilman, 190. A fiction of the law "is deemed to be a legal assumption that a thing is true which is either not true, or which is as probably false as true; the rule on this subject being that the court will not endure that a mere form or fiction of law, introduced for the sake of justice, should work a wrong contrary to the real truth and substance of the thing." Per Lord MANSFIELD, C. J., *Johnson v. Smith*, 2 Burr. 962; Broom, Leg. Max. 128. That a person will accept a deed beneficial to himself when delivered to a stranger for his use, is a good reason, as between grantor and grantee, to apply the fiction of relation. But certainly, where it affects the rights of a third person, there is no sufficient ground for invoking it. The rule is well stated in *Goodsell v. Stinson*, *supra*, in the following words:

"The delivery of a deed is an essential requisite to its validity, and it is from the delivery that the deed takes effect. A deed may be delivered to a third person, even a stranger, for the benefit of the grantee, and if he afterwards assent to the act, the deed will take effect from the date of its delivery,

unless the rights of third persons should be affected by it. In that event the doctrine of relation would not apply, for it is a general rule that it shall not be permitted to apply so as to do wrong to strangers; as between the parties to the deed, it may be adopted for the advancement of justice." 7 Blackf. 439.

If the factor of an intervening right existed in *Doe ex dem. Garnons v. Knight*, 5 Barn. & C. 671, it was not noticed by the court. The court discussed the points in that case as arising between grantor and grantee, or those standing in their positions. The authorities cited and commented on show this. In fact, from the remark made at the close of the opinion in that case, we infer that the court did not intend to decide this question. The remark referred to is this: "Should he" (referring to the defendant) "be able hereafter to show that his mortgage is entitled to a preference, the present verdict will be no bar to his claim."

We do not understand, as contended by appellants' counsel, that the court, in *Hastings v. Vaughn*, 5 Cal. 315, approved of everything in *Doe v. Knight*. It only concurred with it in the point that the intention of the grantor on the issue of delivery was for the jury to decide, and that delivery is a question of fact. The remarks in the opinion, that "many authorities are cited and much good reasoning brought out in support of the position that a deed will be operative although never parted with by the person who executed it,—in other words, that delivery depends more upon intention than upon the mode of fulfilling the intention,"—do not indicate that the court approved all that was laid down in the cause it was referring to. But as to what is quoted above we have this to say: that we have met with no case, either in *Doe v. Knight* or elsewhere, which holds that a delivery of a deed has been held complete where the grantor has never parted with it. As we understand the cases, the grantor must have parted with all control over the deed to make delivery in any case, and especially when delivery is made to a stranger for a third person. *Hulick v. Scovil*, 4 Gilman, 176. After a complete delivery, he may retain the deed in his possession as mere custodian for the grantee; but in every other sense he has parted with it.

We find no error in the conclusion reached by the court below, that the paper purporting to be a conveyance from W. W. Chipman to E. S. Chipman was void for want of a delivery thereof, as against the title of Hibbard and the parties claiming under him. In our view, there was no assent to or acceptance by E. S. Chipman of the paper just mentioned, until the lien of the judgment in *Hibbard v. Chipman* had attached. That being the case, the plaintiffs, claiming under the judgment sale and sheriff's deed, had the better right, unless, for other reasons urged by appellants, the sale by the sheriff and his deed did not pass to the purchaser at such sale a title superior to that of E. S. Chipman, and of defendants claiming under him, which we will proceed to consider.

The judgment under which plaintiffs claim became a lien on the

land in suit, as we have seen, on the first day of March, 1855. An execution in due form of law, directed to the sheriff of the proper county, was issued on this judgment on the twenty-second day of October, 1856. This writ commanded the sheriff to satisfy the judgment named in it, in case sufficient personal property of the defendants could not be found, out of the real property in the county of Alameda belonging to defendants on the day when the judgment was docketed. This, as we have seen, was on the first of March, 1855. The sheriff advertised the land for sale on this execution. The sale under this advertisement was to take place on the seventeenth day of November, 1856. On that day it was sold, and Hibberd was the highest bidder therefor, became the purchaser, and afterwards regularly received the sheriff's deed. This deed recites the writ of execution and the judgment on which it was issued, a levy under the writ on the right, title, and interest of defendants, had by them on the first day of March, 1855, in the lands described in it, advertisement and sale of such lands on the seventeenth day of November, 1856, to James F. Hibberd, etc. It appears that the sheriff, in his advertisement of the sale under the writ of execution, stated that he had seized and taken under the writ all the right, etc., of the defendants in and to the lands levied on, had by them on the first day of March, 1856; that in the certificate of sale executed to Hibberd, after reciting the judgment, execution, and levy, the sheriff stated that he had levied on the right, etc., had by defendants on the first day of March, 1856; that in his return on the writ he stated the same as to the date of the levy on the right, etc., of defendants.

It is contended here by appellants that the sheriff's deed is void as to defendants, and conveys no right anterior to the right of defendants; that conceding that such right of defendants vested on the thirtieth of June, 1855, that the levy of the writ having been made on the title held by W. W. Chipman and Gideon Aughinbaugh on the first day of October, 1856, that the title derived by plaintiffs under the sheriff's deed did not go behind that day, and was, therefore, subsequent and inferior to the title of defendants in this cause. The title of the purchaser at sheriff's sale does not depend on his return to the writ. This has been frequently held. *Ritter v. Scannell*, 11 Cal. 238; *Hunt v. Loucks*, 38 Cal. 382; *Blood v. Light*, Id. 653; *Wilson v. Madison*, 55 Cal. 8. Whether the return be good or bad, sufficient or insufficient, is a matter of no moment to the purchaser, for his title in no manner depends on it. *Ritter v. Scannell*, *supra*. In making out his title the purchaser may use the return, if there is one which is satisfactory to him, but in no case is he required to use or introduce it, and in no case can he be prejudiced by it, whatever be its terms. It is only requisite that he show a sale, and the authority of the officer to make it. The deed shows the former, and the judgment and execution prove the latter. The law is well stated in *Blood v. Light*, by SANDERSON, J., speaking for the court, as follows:

"He is bound to see that there is a judgment which is not *void*, and an execution which is regular upon its face; but as to all the acts of the officer under the execution which precede the sale, he may rely upon the legal presumption that they have been duly performed; that the officer has found no personal property; that he has seized upon the land which he is about to sell; and that he has advertised the sale as required by law. *Cloud v. El Dorado Co.* 12 Cal. 133; *Clark v. Lockwood*, 21 Cal. 224; *Moore v. Martin*, present term, 38 Cal. 428. The statute is directory so far as it deals with the manner in which the officer is required to execute the writ, (*Smith v. Randall*, 6 Cal. 50; *Webber v. Coax*, 6 T. B. Mon. 110; *Hayden v. Dunlap*, 3 Bibb, 216;) and hence, although his failure to comply with its provisions may be sufficient cause to set the sale aside, upon the application of the parties to the writ, yet it does not render the sale void. *San Francisco v. Pixley*, 21 Cal. 59. It is the policy of the law to uphold judicial sales, when collaterally attacked, by securing purchasers, as far as possible without prejudice to others, against risk. Such a course is to the interest of both creditors and debtors, who would be alike prejudiced by a rule which would tend to the insecurity of titles obtained in that way. It is no obstacle to this policy to require the purchaser to take the risk of the officer's authority to sell, for that can be readily determined by an inspection of the judgment and execution under which he is acting; but to require him to ascertain and determine whether the officer has left a copy of the writ with the occupant of the land; or, if there was no occupant, that he has posted a copy upon the premises, and filed another copy, with a description of the land, with the county recorder, in case where the land stands on the records of the county in the name of the defendant in the execution; or, when it stands upon the records in the name of some other person, that he has left with such person, or his agent, a copy of the writ and a notice that the land, (describing it,) and any interest which the defendant has therein, has been seized under the writ, and that he has filed a copy of the writ and notice with the recorder of the county, and left another copy with the occupant of the land; or, if there was no occupant, that he has posted a copy in a conspicuous place on the land; that the judgment debtor has no personal property; that the land is being sold in appropriate parcels; or that it is being sold according to the directions of the judgment debtor; and that it has been advertised according to law,—would amount almost to an inhibition upon judicial sales, and tend greatly to the sacrifice of the land, to the prejudice of all the parties concerned. Guided by these considerations, the legislature has nowhere provided that the validity of a purchaser's title shall depend upon the manner in which the officer has performed his duty; but, on the contrary, without any limitation or qualification to that effect, has provided that, 'upon a sale of real property, the purchaser shall be substituted to, and acquire all the right, title, interest, and claim of, the judgment debtor thereto.' Section 299. Whether the officer has performed his duty lies between him and the parties to the writ, and the purchaser cannot be prejudiced by his remissness or neglect." 38 Cal. 654, 655.

In the case of a sale of land by the sheriff, the title dates from the lien of the judgment as against third persons, and not from the date of any real or pretended statutory levy. *Blood v. Light*, 38 Cal. 657. The title acquired by the deed of the officer relates back to the date of the judgment lien, for the judgment is the source of his authority, and by such relation the last act is carried back to the first in making out the title, and takes priority as of the date of the first, which is the day of the judgment lien. *Landes v. Brant*, 10 How. (U. S.) 348. Neither E. S. Chipman nor defendants here are third persons. They stand in no more favorable position than the defend-

ants in the judgment. They are purchasers here from one of the latter, with full opportunity to inspect the judgment from which plaintiffs deraign their title. They were bound to know and to yield to the execution and sheriff's deed. Of these they were bound to take cognizance as a legal sequence of the judgment and its lien. We cannot concur in the contention of defendants. The acts of the sheriff referred to are mere irregularities, which did not affect the title of the purchaser at the sale by the sheriff.

We find no error in the record.

The judgment should be affirmed; and it is so ordered.

We concur: ROSS, J.; MYRICK, J.; MCKINSTY, J.

65 Cal. 345

BAYLY *v.* MUEHE. (No. 8,165.)

Filed July 25, 1884.

JUDGMENT MODIFIED.

In bank. Appeal from the superior court of the city and county of San Francisco.

The opinion in bank, modified hereby on rehearing, is reported *ante*, 202. The original opinion in department and in bank is reported 3 PAC. REP. 467.

F. J. Castlehem and Stanley, Storey & Hayes, for appellant.

Stetson & Houghton and A. & H. C. Campbell, for respondent.

BY THE COURT. Ordered, that the judgment rendered herein on June 27, 1884, be modified so as to read, "judgment reversed and cause remanded, with directions to the court below to render judgment for defendant on the findings."

THORNTON, J., *dissenting*. I dissent. I adhere to my opinion formerly filed, (3 PAC. REP. 467,) and desire it to stand as my opinion in this case. Conceding that the legislature has the power to dispense with the heirs of an intestate as parties to a suit to foreclose a mortgage executed by their intestate, and to provide that such suit be against the administrator as the sole party, it has not done so. No statute has been called to my attention which has this effect, nor have I been able to find one.

2 Cal. Unrep. 353

JACK and others v. SAUNDERS. (No. 9,237.)

Filed August 2, 1884.

PRACTICE—JUDGMENT—CONFLICTING EVIDENCE.
Where there is a material conflict in the evidence, the judgment of the lower court will not be disturbed on the ground that it was not justified by the evidence.

Department 2. Appeal from the superior court of San Joaquin county.

J. C. Campbell, for appellants.

McStoy & Swinserton, for respondent.

BY THE COURT. Appellants' counsel, in his "points and authorities," insists that the order denying the motion for a new trial should be reversed on the ground that the decision of the court below was not justified by the evidence. We have examined the evidence and found a material conflict therein, and for that reason cannot disturb the order appealed from.

Judgment and order affirmed.

CAPITAL SAVINGS BANK v. CRONKITE. (No. 9,499.)

Filed July 31, 1884.

PRACTICE—FINDINGS—JUDGMENT

Department 2. Appeal from the superior court of Sacramento county.

This was a proceeding to recover the amount due on certain county warrants. The complaint alleged an indebtedness by the county, the execution of the warrants therefor, and the validity of the same. The defendant denied the validity of the warrants. The court found the allegations of the complaint to be sustained, and those of the answer to be untrue. Defendant appealed.

S. W. Griffith, V. A. Gregg, and J. F. Lewis, for appellant.

Freeman & Bates, for respondent.

BY THE COURT. We think the findings support the judgment, and as that is the only question presented by the record, the judgment is affirmed.

65 Cal. 491

BRANNOCK *v.* MONROE. (No. 8,666.)

Filed Aug. 2, 1884.

PUBLIC LAND — QUITCLAIM DEED FROM HUSBAND TO WIFE — AFTER-ACQUIRED TITLE OF HUSBAND.

A husband, having entered on certain United States and state lands, and having no other right than possession, executed to his wife, as a gift, a quitclaim deed to the premises. Thereafter he, in his own name, purchased the state land, and received a patent to the United States lands under the homestead laws. *Held* that, as the wife could not enter on such lands under existing laws, she derived no right under the deed to her, and the husband, in afterwards acquiring title to such lands, did so for himself, and did not take the title in trust for the wife.

Department 1. Appeal from the superior court of San Joaquin county.

W. L. Dudley and Terry & Terry, for appellant.

Byers & Elliot and J. H. Budd, for respondent.

BY THE COURT. On the twelfth of January, 1863, the plaintiff was in the occupancy, with his wife, Hester A. Brannock, of the land in controversy, consisting of the N. E. $\frac{1}{4}$ of a certain section 36, and the S. E. $\frac{1}{4}$ of a certain section 25. On that day, having no interest in the land but his possession, plaintiff executed to his wife, as a gift, a quitclaim deed to the premises. Both continued to live there. On the twelfth of December, 1865, plaintiff entered, under the homestead laws of the United States, the S. E. $\frac{1}{4}$ of section 25, and in December, 1869, completed the entry, made proof and payment, and on May 5, 1871, received a patent from the United States therefor. On the twenty-ninth of May, 1866, plaintiff purchased from the state of California, in his own name, the N. E. $\frac{1}{4}$ of section 36, receiving therefor from the state a certificate of purchase. On the twentieth day of June, 1869, Hester A. Brannock died, and it is claimed on the part of her children that the plaintiff should be held to have taken the title to the two tracts of land in trust for her. This claim is based solely on the relation existing between the parties. There is no pretense that in the entry and purchase of the land the plaintiff used the separate funds of his wife, or that plaintiff acted at her request or on her behalf, as a matter of fact. With respect to the homestead entry, Mrs. Brannock was not a person authorized by the laws of the United States to make the entry, and equity will not charge the grantee of the title from the government with a trust in respect to that title, in favor of one who was not authorized by the law to acquire the title from the government. Nor, under the law existing at the time, could Mrs. Brannock have made the purchase from the state of the N. E. $\frac{1}{4}$ of section 36. We see no ground for holding that plaintiff took the title of the property in trust for his wife.

Judgment affirmed.

PEOPLE v. BUCKNER. (No. 10,962.)

Filed August 2, 1884.

CRIMINAL LAW AND PROCEDURE—DISCREDITING WITNESS—CONVICTION OF OFFENSE.

In order to discredit a witness by showing his conviction of an offense, the best evidence of the conviction is requisite. *People v. Reinhart*, 39 Cal. 449, and *People v. McDonald*, Id. 697, followed.

Department 1. Appeal from the superior court of Stanislaus county.

The facts in this case are the same as in *People v. Reinhart*, 39 Cal. 449, and *People v. McDonald*, Id. 697.

L. J. Maddox and *W. E. Turner*, for appellant.

The Attorney General, for respondent.

BY THE COURT. On the authority of *People v. Reinhart*, 39 Cal. 449, and *People v. McDonald*, Id. 697, the judgment and order are reversed, and cause remanded for a new trial.

65 Cal. 496

MORTON v. SUPERIOR COURT TULARE COUNTY. (No. 9,070.)

Filed August 5, 1884.

1. CONTEMPT—INJUNCTION—CORPORATION.

The petitioner, who was president of a water corporation at the time when an injunction was granted and served on them prohibiting them from maintaining a dam in the channel of a certain water-course, resigned such office, left the corporation, sold his shares therein, and then purchased the property where said dam had been constructed, and proceeded to maintain the same. Held that he was properly adjudged guilty of contempt.

2. SAME—OFFICER OF CORPORATION.

An officer of a corporation may sever his connection with the corporation; he may also individually acquire property, real or personal, from others; but he will not be permitted to exercise such rights for the mere purpose of treating with contempt the orders and decrees of a court which he is bound to respect.

3. PRACTICE—SATISFACTION—REVIEW OF JUDGMENT.

Satisfaction means payment; and payment of a judgment cannot be treated as void for the purpose of attacking the jurisdiction of the court that rendered it. Until the satisfaction is set aside, on motion to vacate or otherwise, the judgment cannot be reviewed.

Department 1. Application for *certiorari*.

Brown & Daggett, for petitioners.

McKEE, J. This is an application for a writ of *certiorari* to review certain proceedings in the superior court of Tulare county, in which the petitioner was adjudged guilty of contempt of court, and fined \$250, and ordered to be imprisoned until he removed a dam in the

channel of a water-course, which he was charged with maintaining in violation of a decree of the court perpetually enjoining its construction and maintenance. The contention is that the judgment against the petitioner was void, because the proceedings in which it was rendered show that he was not a party to the injunction decree, and that the injunction had not been personally served upon him, and therefore he was not bound by that decree. But the decree was rendered against the Kaweah Canal & Irrigation Company, a water corporation, of which the petitioner was president and a director, and in which he was a stockholder. It required the corporation to remove the dam in controversy in the case, and enjoined the corporation, its officers, agents, and employes, and all persons acting under it, from continuing or maintaining the same. Service of the decree was regularly made upon the secretary of the corporation, and after service the corporation, by its superintendent, in obedience to the decree, caused the dam to be removed. But soon after its removal the petitioner resigned the offices of president and director in the corporation, and transferred his certificates of stock therein, and then entered into a verbal arrangement with one Johnson to purchase from him a tract of land which included the locality from which the dam had been removed. Under that arrangement he entered upon the land, reconstructed the dam, and insisted upon his right to maintain it, because neither he nor Johnson, from whom he derived his right, was a party to the injunction suit.

The court found that the petitioner had "full notice and knowledge of the issuance and service of the injunction," and that "he was maintaining the dam as the agent of the corporation, in violation of the injunction." There is no force in the objection that the finding is not sustained by the evidence. The fact was fairly deducible from the admitted relation existing between the petitioner and the corporation. Besides, "the effect of an injunction restraining any acts of a corporate body, and addressed to it and its agents, etc., is to bind not only the *intangible artificial being*, but also all the individuals who act for the corporation in the transaction of its business to whose knowledge the decree comes. Unless this be so, it would be necessary, in order effectually to bind a corporation by an injunction, to make every person a party to a suit who could by any possibility be its agent in doing the prohibited act." High, Inj. § 850. Undoubtedly, an officer of a corporation has a right to sever his connection with the corporation, and to individually acquire property, real or personal, from others; but he will not be permitted to exercise his right for the mere purpose of treating with contempt the orders and decrees of a court which he is bound to respect. "Injunction orders *must be fairly and honestly* obeyed, and not defeated by subterfuges and tricks on the part of those bound to obey them. They may be violated by aiding, countenancing, and abetting others in violation thereof, as well as doing it directly; and courts do not look with indulgence upon schemes,

however skillfully devised, designed to thwart their orders." *People v. Pendleton*, 64 N. Y. 624.

The order adjudging the petitioner guilty of contempt was made in the proper exercise of the jurisdiction of the court to enforce obedience to its mandates. Besides, the order or judgment has been satisfied. After the petitioner was imprisoned he caused the dam which had been reconstructed by him in violation of the injunction to be removed, and thereupon the court ordered him to be released from custody, which was done; and afterwards he voluntarily paid into court the amount of the fine, thus entirely satisfying the judgment. Satisfaction means payment; and payment of a judgment cannot be treated as void for the purpose of attacking the jurisdiction of the court that rendered it. The party had his remedy, by motion or otherwise, to vacate the satisfaction; but until set aside it is valid; and the judgment itself has passed beyond review. Satisfaction is the last act and end of the judicial proceedings.

Writ dismissed.

We concur: ROSS, J.; MCKINSTRY, J.

65 Cal. 489

TAYLOR v. BIDWELL. (No. 9,460.)

Filed, August 2, 1884.

1. MALICIOUS PROSECUTION—CONSPIRACY—PLEADING.

In an action for damages, based on alleged acts of conspiracy and malicious prosecution, the averments of the complaint respecting the conspiracy of the defendants are not of the gist of the action; that lies in the wrongful and damaging act done. The *gravamen* of the action is in the alleged malicious prosecution.

2. SAME—SUBORNATION OF WITNESSES.

Subornation of witnesses to swear falsely in a criminal prosecution against a defendant do not constitute a cause of action by him for damages.

3. SAME—ACTION FOR DAMAGES—STATUTE OF LIMITATIONS.

An action for damages for malicious prosecution which was not brought within four years, *held* barred by the statute of limitations.

Department 1. Appeal from the superior court of Butte county.
Clara S. Foltz and *W. H. Payson*, for appellant.

F. C. Lusk, for respondent.

Ross, J. The *gravamen* of the action is the alleged malicious prosecution. The averments of the complaint, with respect to the conspiracy of the defendants, are not of the gist of the action; that lies in the wrongful and damaging act done. *Herron v. Hughes*, 25 Cal. 560. Said Chief Justice HOLT in *Savile v. Roberts*, 1 Ld. Raym. 378: "An action will not lie for the greatest conspiracy imaginable if nothing be put in execution; but if the party be damaged the action will

lie. From whence it follows that the damage is the ground of action." See, also, *Hutchins v. Hutchins*, 7 Hill, 104.

The averments with respect to the defendants' suborning a witness to swear falsely in the criminal prosecution against the plaintiff do not constitute a cause of action for damages. *Smith v. Lewis*, 3 Johns. 157; *Homer v. Fish*, 1 Pick. 441; *Smith v. Lowry*, 1 Johns. Ch. 320. In *Smith v. Lewis* the court observed that however just and reasonable it may appear, upon the first view of the proposition, that a man who has by perjury injured another, should be answerable, yet, on a nearer inspection, when the mischiefs resulting from upholding that proposition are considered, the conclusion must be that it would be dangerous in the extreme to sustain the action. In the case of *Eyres v. Sedgwick*, Cro. Jac. 601, it became a question whether a person who had made a false affidavit in chancery, whereby the plaintiff was imprisoned by the chancellor, was liable to an action for the injury, and it was held by all the judges, except Houghton, that to punish this perjury by an action on the case, under pretense of a false oath, should not be suffered; and Houghton, who differed, admitted that if the defendant had come in by process of law as a witness, it had been otherwise, for then he would have been punishable by indictment. If, as said in *Smith v. Lewis*, the very person who has committed the supposed injury is not answerable civilly, surely the person procuring it will not be amenable.

These considerations lead to what was first said, that the case at bar can only be regarded as one for malicious prosecution; and as the alleged malicious prosecution occurred in the years 1878 and 1879, and this action was not commenced until September 3, 1883, the court below rightly held the action barred by the provisions of the statute of limitations. *Piller v. S. P. R. Co.* 52 Cal. 42; *Sharp v. Miller*, 54 Cal. 329; *Wood v. Currey*, 57 Cal. 208.

Judgment affirmed.

We concur: MCKINSTRY, J.; MCKEE, J.

65 Cal. 494

KETCHUM v. SUPERIOR COURT SAN JOAQUIN COUNTY. (No. 9,003.)

Filed August 5, 1884.

JUSTICE OF PEACE—APPEAL—TRIAL DE NOVO—AMENDMENT TO PLEADING.

In an appeal from a justice to the superior court, on questions of law and fact, the latter court has jurisdiction to try the action *de novo*, and such trial must be conducted in all respects as trials in other cases. On such new trial the court has jurisdiction to allow an amendment to the pleadings in any particular.

Department 1. Application for writ of *certiorari*.

J. H. Budd, for petitioner.

McKEE, J. The case in hand originated in an action brought in a justice's court to recover damages for the detention of some milch cows, to whose possession the plaintiff, as owner of the cows, claimed to be entitled. The answer filed in the justice's court was a general denial. Upon that the case was tried, and the defendant had judgment, from which the plaintiff appealed on questions of both law and fact. At the trial of the case on appeal the superior court allowed the defendant to amend his answer by pleading justification for taking and detaining the cattle. To this ruling the plaintiff excepted; and it is contended that the court, in allowing the amendment, exceeded its jurisdiction, because it had only acquired jurisdiction, by the appeal, to try the action upon the issues raised by the pleadings in the justice's court. But it must be conceded that the court had jurisdiction to try the action *de novo*, (section 976, Code Civil Proc. ;) and such a trial must be conducted in all respects as trials in other cases. All the provisions of the Code of Civil Procedure relative to the trial of cases which have been commenced within the original jurisdiction of the court are made applicable to the trial *de novo* of cases within its appellate jurisdiction. Section 980, *supra*. Now, there is no question that, on the trial of a case originating in the superior court, an amendment to a pleading in the case in any particular may be allowed by the court, upon such terms as may be just. This may be done at any time in the course of the proceedings, or during the trial, where the ends of justice may be promoted thereby, (section 473, *supra*;) and being allowable on the trial of a case within the original jurisdiction of the court, it is also allowable on the trial *de novo* of a case within its appellate jurisdiction.

Jones v. County of El Dorado, 10 Cal. 19, and *Funkenstein v. Elgutter*, 11 Cal. 328, are not analogous. It is true that in each of those cases an appeal had been taken on questions of both law and fact from the judgment of a justice's court to the county court; but the judgment was by default, and on appealing from it there was no statement of the grounds upon which the appellant intended to rely on the appeal on questions of law, nor was there any issue of fact raised in the justice's court. That being the condition of the case on appeal, there was no question of law to decide, and no question of fact to try; therefore the appellate court acquired no jurisdiction to retry the case. *Rickey v. Superior Court*, 59 Cal. 661. But in the case in hand there were issues of fact which the court had jurisdiction to retry; and as we have shown that this jurisdiction included authority to allow any amendment to the pleadings by which the issues were raised, so as to enable the parties to present the case on its merits, the allowance of such an amendment was a matter within the sound discretion of the court, and is not reviewable on *certiorari*, even if the exercise of the authority by the court was irregular or erroneous. It is sufficient that the act of the court was within its jurisdiction.

tion. *Cariaga v. Dryden*, 29 Cal. 307; *Kitts v. Superior Court*, 62 Cal. 203.

Application for a writ of *certiorari* denied.

We concur: Ross, J.; McKINSTRY, J.

65 Cal. 492

FLEMING v. HAWLEY. (No. 8,910.)

Filed August 4, 1884.

1. RES ADJUDICATA—JUDGMENT OF NONSUIT IN FORMER ACTION.

In an action for claim and delivery, the fact set up in defendant's answer as new matter—that in another action by defendant against plaintiff to recover the same property, a judgment of nonsuit had been rendered against him—is no defense in the present action, and such matter is sham and irrelevant.

2. SAME—ACTION FOR CLAIM AND DELIVERY—QUESTIONS INVOLVED.

An allegation of new matter in defendant's answer in such an action—that the present plaintiff, at a time prior to commencement of the present action, sued for and recovered the property in controversy of a third party—is no defense to this action. The only questions here are whether the plaintiff is the owner and entitled to the possession of the property in question, and whether this defendant wrongfully withholds its possession from him.

Department 1. Appeal from the superior court of Tulare county.

Atwell & Bradley, for appellants.

Edwards & DuBrutz, for respondents.

Ross, J. Action of claim and delivery to recover the possession of 64 flasks of quicksilver, alleged by the plaintiff to be his property, and to be unlawfully withheld from him by the defendant. The answer put in issue the material averments of the complaint, and by way of "further and separate defense" set up certain matters which were, on motion of plaintiff, stricken out in the court below. That action on the part of the court constitutes the first ground of complaint here.

Upon looking into the answer it is plain to be seen that the affirmative matters set up do not constitute any defense to plaintiff's action. By the first alleged "separate defense" the defendant, in effect, says that in a certain action which he at one time brought against the present plaintiff to recover the same property, judgment of nonsuit was entered against him. It is perfectly clear that the defendant in this action could derive no benefit by reason of the judgment against him in that. In the second alleged "separate defense," defendant, in effect, set up that the present plaintiff, at a time anterior to the commencement of this action, commenced one against one Wells to recover the property in controversy, and got judgment on the pleadings for its recovery, with damages and costs. But all that has nothing to do with the present case, in which the questions are

whether the plaintiff is the owner and entitled to the possession of the property in question, and whether *this defendant wrongfully withholds its possession from him*. All of the matters set up in the alleged separate defenses were sham and irrelevant, and were properly stricken out by the court below.

Nor was there error on the part of the court in denying the defendant's motion to strike out all of the testimony of the witnesses Hawley and Fowler. This motion was based on the statement of defendant's counsel, that the evidence showed that the agreement between Hawley and Fowler in respect to the property was consummated in a bill of sale. The record shows that Hawley distinctly testified that at the time the property was sold and delivered to him no bill of sale or memorandum in writing was made.

We must affirm the judgment and order. Ordered accordingly.

We concur: McKEE, J.; McKINSTRY, J.

2 Cal. Unrep. 354

NOCE v. DAVEGGIO. (No. 9,387.)

Filed August 5, 1884.

1. PRACTICE—APPEAL—ENTRY OF ORDER NUNC PRO TUNC—TIME FOR APPEAL.

An order entering judgment *nunc pro tunc* does not deprive a party of his right to appeal. The time for appeal dates from the actual entry of the judgment.

2. PARTITION—TENANTS IN COMMON—DEED.

A conveyance to plaintiff, vesting in him an undivided interest in land, and making him a tenant in common with defendant, entitled him to a partition; and the fact that he had never been in occupancy of the land, and that his grantors and the defendant were copartners in the crops raised on the land, did not affect his right to partition.

3. PRACTICE—JUDGMENT—FINDING—EVIDENCE.

Judgment and findings *held* not sustained by the evidence.

Department 1. Appeal from the superior court of Amador county.

D. B. Spagnoli and Caminetti & Rust, for appellant.

G. G. Blanchard and Eagon & Phelps, for respondent.

McKee, J. It is objected that the appeal in this case was not taken in due time. The case was tried, and judgment ordered for defendant, on the thirtieth of September, 1881; but no judgment was entered until the thirtieth of July, 1883. Then, on motion of defendant's attorney, the court caused judgment to be entered in favor of the defendant, *nunc pro tunc*, as of the thirtieth of September, 1881. The appeal was taken from this judgment on the twenty-seventh of November, 1883; it was therefore in time. A *nunc pro tunc* order does not deprive a party of his right to appeal. The time for appeal dates from the actual entry of the judgment. *In re Fifteenth Avenue Extension*, 54 Cal. 179.

The action was partition. The answer of the defendant contained a general denial, and a plea of partnership existing between himself and the grantor of the plaintiff. On motion the plea of partnership was stricken out. But on the trial of the issue, raised by the general denial, evidence of a partnership was admitted, and the court found as facts that on the fifteenth of July, 1876, the grantor of the plaintiff and the defendant were co-owners of the land in controversy, and copartners in cultivating the same, and that these relations existed between them until the ninth of August, 1880, when the co-tenant of the defendant conveyed his undivided interest in the land to the plaintiff. And, as a conclusion of law, the court held that the plaintiff was not entitled to partition, and ordered that the action be dismissed, and that judgment be entered against the plaintiff for costs.

The decision was against law. The conveyance to the plaintiff vested in him an undivided interest in the land, and made him a tenant in common therein with the defendant, and entitled him to partition. The fact that he had never been in occupancy of the land, and that his grantor and the defendant were copartners in the crops raised on the land, did not affect his right to partition. *Martin v. Walker*, 58 Cal. 590.

Judgment reversed, and cause remanded for further proceedings.

ROSS, J. I concur.

McKINSTRY, J. I concur in the judgment.

SUPREME COURT OF CALIFORNIA.

65 Cal. 500

SLAVONIC ILLYRIC MUTUAL BENEVOLENT ASSOCIATION *v.* THE SUPERIOR
COURT OF SANTA CLARA COUNTY. (No. 9,632.)

Filed August 12, 1884.

PRACTICE—APPEAL—SPECIAL ORDER AFTER JUDGMENT—CERTIORARI.

An order entered in an action on a note, after judgment against defendant, that the defendant pay the amount of the judgment into court, and that the clerk enter satisfaction of the judgment pending proceedings to determine the sanity of plaintiff's assignee, and his competency to assign the note sued on, and for the further purpose of ascertaining whether plaintiff, (the petitioner,) or the guardian of his assignee, is entitled to the money, is a special order made after final judgment, and appealable, and therefore not the subject of review by *certiorari*.

Department 2. Application for writ of review.

Burt & Pfister, for petitioner.

BY THE COURT. This is an application for a writ of review. In an action brought by petitioner against one Mullinary to recover the amount due on a promissory note, judgment was rendered in favor of the petitioner for the amount due thereon, and executions were issued. The note had been assigned by one Marinovich to said petitioner. After the rendering of the judgment, it was claimed on behalf of Marinovich that at the time of the assignment he was an incompetent person by reason of insanity. The defendant in that action paid the amount of the judgment to the clerk of the court, and the court ordered satisfaction of the judgment to be entered and the money retained by the clerk, to the end that proceedings might be had for the purpose of ascertaining and determining whether the petitioner or the guardian of Marinovich would be entitled to the money.

We are of opinion that the order was a special order made after final judgment, within the meaning of subdivision 3, § 939, Code Civil Proc., and appealable, and therefore not the subject of review by this proceeding.

Order to show cause discharged, and application denied.

2 Cal. Unrep. 356

HERZOG v. JULIEN. (No. 9,528.)

Filed August 13, 1884.

PRACTICE—ORDER OF TRIAL COURT—CONFLICTING EVIDENCE.

In case of a conflict of evidence the appellate court will not interfere with the order of the court below, granting a new trial.

Department 2. Appeal from the superior court of Siskiyou county.
Laura De Force Gordon, for appellant.

Nichols & Abels and *H. B. Warren*, for respondent.

BY THE COURT. Action to recover damages for an alleged malicious prosecution. The jury gave the plaintiff a verdict for \$12,000. The court below granted a new trial on the ground of excessive damages, and because the verdict was not sustained by the evidence, and was contrary to the law and evidence. The evidence was conflicting as to the want of probable cause. In case of conflict, it has been held by this court that it would not interfere with the order of the court below granting a new trial. In *Dickey v. Davis*, 39 Cal. 565, the court said:

"In this court, when there is a substantial conflict in the evidence, we decline to set aside a verdict or finding of facts as being contrary to the weight of evidence, solely because we have had no opportunity to observe the manner of the witnesses, and to decide upon their credibility. But this reason does not apply to the district judge, and though it is the peculiar province of the jury to decide upon the facts submitted to them generally, in doubtful cases the verdict ought not to be set aside as contrary to the weight of the evidence. Nevertheless, if the judge is not satisfied with the verdict, and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside, even though there may have been some conflict in the testimony. He has had the same opportunity as the jury to observe the manner of the witnesses and to decide upon their credibility, and it is his duty to see that the verdict is not clearly against the weight of evidence. He must exercise a wholesome and discreet supervision over the jury in this respect. 'The fact that there may have been evidence submitted to the jury on both sides of the points at issue, does not exclude the exercise of this beneficial supervision. If it did, no matter how weak the testimony on one side and how strong on the other, the judge would be restrained from interference, notwithstanding the verdict was manifestly against the weight of evidence. If such a rule was adopted, litigants would be sure to accommodate themselves to it by introducing mere formal (if they could command no other) evidence to oust the authority of the court.' 3 Grah. & Wat. N. T. 1207."

Order affirmed.

65 Cal. 498

CHANDLER v. PEOPLE'S SAVINGS BANK and others. (No. 9,263.)

Filed August 12, 1884.

PRACTICE—REVERSING FINDING BECAUSE NOT SUSTAINED BY EVIDENCE.

Where, on appeal from the superior court, the supreme court reverses the judgment of the lower court, on the ground that the findings of fact are not sustained by the evidence, the effect is to send the cause back to the lower court for a new trial, subject to the views expressed by the appellate court. In such case the supreme court cannot direct what judgment should be entered.

H. O. Beatty and *A. L. Hart*, for appellant.

J. McKenna and *Freeman & Bates*, for respondent.

Department 2. Appeal from the superior court of Sacramento county.

THORNTON, J. In this case, when here before, on appeal by the intervenor from the judgment, the judgment was reversed on a matter relating to interest on certain balances, on the ground that the finding of fact as to such interest was not sustained by the evidence. This plainly appears from the opinion in the cause. See *Chandler v. People's Savings Bank*, on the *Appeal of Margaret Poorman*, 61 Cal. 401. It is said in the opinion, referring to the finding as to this interest, "this finding is attacked by the intervenor, and it appears to be unsustained by the evidence." This interest appears to have been computed on certain monthly balances ascertained in making up the account between the plaintiff and one Poorman, the assignor of the intervenor, and as to this the court said in the opinion: "Moreover, the finding of the court that the interest on the 'monthly balances,' in favor of Chandler, from December, 1865, until October, 1878, amounted to two thousand seven hundred and ten dollars, is not borne out by the testimony." The finding, in the judgment of the court, was not sustained by the evidence, because the testimony did not show that they were interest-bearing, and it also showed a miscalculation.

As we understand the judgment in the case, a reversal was ordered because the finding was not sustained by the evidence, and the cause was remanded for further proceedings according to the views expressed in the opinion.

Certainly, this order of the court left the inquiry as to interest open, as if no trial had been had on it. The plaintiff was at liberty in a new trial, if in his power, to show that the balances were of the kind which bore interest. The offers of the plaintiff which were ruled out were made with this view; that is, to show that the balances were of the character which entitled him to have interest on them. Civil Code, § 1917. The court should have allowed these offers. In our view, the cause was open for a new trial, subject to the views expressed by the court in the cases of *Chandler v. People's Bank*, 61 Cal. 396; *S. C. Id.* 401.

This court having reversed the judgment because the testimony

was insufficient to sustain the finding on any material point, cannot direct what judgment should be entered. If it did this, it would be finding facts, which it has no authority to do. That is the province of the court below, with which this court cannot interfere. Where, under such circumstances, the cause is remanded for further proceedings, unless the order of this court is restricted, the cause goes back to the superior court to be retried, subject to the views expressed by this court.

The court erred in its rulings in excluding the offers of plaintiff, and therefore the judgment is reversed and the cause remanded, that there may be a new trial, as above indicated.

We concur: SHARPSTEIN, J.; MYRICK, J.

2 Cal. Unrep. 355

YEAZELL v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO. (No. 9,608.)

Filed August 12, 1884.

JUSTICE OF PEACE—APPEAL—JUDGMENT ENTERED BY CONSENT.

A judgment entered by consent in the justice's court is not appealable, and the superior court is authorized to dismiss such an appeal of its own motion.

Department 2. Application for writ of review.

John Wade, for petitioner.

By THE COURT. The application for the writ is denied. The appeal was taken from a judgment entered by consent in the justice's court, and the superior court was authorized to dismiss the appeal of its own motion, on an inspection of the record. Such a judgment was not appealable. If the judgment was entered in the justice's court contrary to the stipulation, the remedy was by motion in that court.

2 Cal. Unrep. 356

PEOPLE *v.* MURRAY. (No. 10,967.)

Filed August 12, 1884.

CRIMINAL LAW AND PROCEDURE.

Judgment *held* not sustained by the evidence.

In bank. Appeal from the superior court of Tehama county.

A. W. Gale and *C. W. Ashurst*, for appellant.

The Attorney General, for respondent.

By THE COURT. The defendant was accused, by information, of taking from her mother a female under the age of 18 years, for the purpose of prostitution, under section 267, Penal Code. There was no evidence that the infant was taken from the charge or custody of her mother.

Judgment and order reversed, and cause remanded for a new trial.

2 Cal. Unrep. 358

ALPERS *v.* SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO. (No. 9,381.)

Filed August 14, 1884.

JUSTICE OF PEACE—APPEAL TO SUPERIOR COURT—ACTION ON CONTRACT.

Actions on contract, commenced in the justice's court and appealed to the superior court, are within the jurisdiction of those courts, and therefore not subject to review on *certiorari*.

Department 2. Application for writ of review.

R. P. Wright, for petitioner.

By THE COURT. This is an application for a writ of review. The action, commenced in the justice's court and appealed to the superior court, was upon a contract, and those courts had jurisdiction. Application denied and proceeding dismissed.

2 Cal. Unrep. 358

SMYTH v. THE STOCKTON & COPPERAPOLIS R. CO. (No. 9,029.)

Filed August 18, 1884

RAILROAD COMPANY—LIABILITY FOR DAMAGE CAUSED BY FIRES.

A railroad company is not liable for damages caused by fire escaping from its engines, if such engines are in good order, properly constructed, and supplied with the best appliances in use to prevent the escape of fire, unless the fire escaped through the negligence of the servants of said railroad company in managing such engines.

Department 1. Appeal from the superior court of San Joaquin county.

W. L. Dudley, for appellant.

D. S. & S. L. Terry, for respondent.

Ross, J. The plaintiff sued to recover of defendant damages for the destruction by fire of certain property alleged to have been communicated by sparks emitted from one of defendant's locomotives. As to whether the engine was in proper order and was properly managed by the employes of defendant at the time in question, the testimony on behalf of the respective parties differed. Upon the conclusion of the evidence the defendant requested the court to charge the jury, among other things, that if they believed from the evidence "that the damages claimed by the plaintiff were caused by fire escaping from defendant's engine, and find further that the engine was in good order, properly constructed, and supplied with the best appliances in use to prevent the escape of fire, then the defendant was not guilty of negligence in such escape of the fire, and is not liable, unless the fire escaped through the negligence of the agents and servants of the defendant in managing the engine and machinery." This instruction was refused. In view of the testimony in the case it ought to have been given. *Shear. & R. Neg.* (3d Ed.) §§ 332, 333, 334, and authorities there cited.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MCKINSTRY, J.; MCKEE, J.

65 AL. 505

KETTLEMAN *v.* TREADWAY. (No. 8,195.)

Filed August 18, 1884.

A BITRATION—ENTRY BY CLERK—STIPULATION.

A submission for arbitration must be noted by the clerk in his register of actions. The stipulation must authorize the clerk to make the entry, and the clerk must make the entry. The mere authority to make the entry is not sufficient, and, in absence of the entry itself, there is no jurisdiction over the subject-matter or parties.

Department 1. Appeal from the superior court of the county of San Joaquin.

W. L. Dudley and J. A. Louttit, for appellant.

Terry, McKinne & Terry and J. H. Budd, for respondent.

Ross, J. The proceedings which were in effect annulled by the court below were founded on a written submission to arbitration of some matters of difference between the respective parties. For the respondent it is urged that the submission itself is void for want of certainty; but this objection need not be considered, for the reason that no note of the submission to arbitration was ever entered by the clerk of the superior court in his register of actions, as required by section 1283 of the Code of Civil Procedure. As said by this court in *Pieratt v. Kennedy*, 43 Cal. 393, the clerk must, "in the first place, be authorized by the stipulation to make note in his register, and in the second place he must, in fact, make it there. The mere authority, without the act done, is no more than the act done without the authority would be. Both these must concur, (*Ryan v. Dougherty*, 30 Cal. 218,) and in the absence of either there is no jurisdiction over the subject-matter or of the parties."

Order affirmed.

We concur: **MR. KINSTY, J.; MCKEE, J.**

65 Cal. 501

PEOPLE v. MULKEY. (No. 10,952.)

Filed August 18, 1884.

CRIMINAL LAW AND PROCEDURE—EVIDENCE—CONVICTION.

The crime charged in an information must be proved before a conviction can be had.

Department 1. Appeal from the superior court of Fresno county.

M. V. Ashbooke, for appellant.

The Attorney General, for respondent.

Ross, J. The defendant was charged by information with the crime of feloniously entering a certain dwelling-house with intent to commit larceny. The court below instructed the jury that if they believed from the evidence that the defendant entered the house with intent to commit grand or petit larceny, or *any felony*, they should find him guilty. This instruction was clearly erroneous. There is nothing better settled than that the crime charged must be proved before a conviction can be had.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MCKINSTRY, J.; MCKEE, J.

65 Cal. 502

BLISS v. KAWEAH CANAL & IRRIGATION Co. (No. 9,378.)

Filed August 18, 1884.

1. CORPORATION—EXECUTION OF INSTRUMENT—PRESUMPTION AS TO AUTHORITY OF OFFICERS.

When the common seal of a corporation appears to be affixed to an instrument, and the signatures of the proper officers are proved, courts are to presume that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority. The contrary must be shown by the objecting party. But the corporate seal does not render the instrument a corporate act unless it is affixed by an officer or agent duly authorized.

2. SAME—POWER TO SELL OR PURCHASE REAL ESTATE.

The power, at discretion, to sell or purchase real property cannot be conferred upon any agent other than the trustees themselves. The president of a corporation has no such power either by statute or by implication.

3. PRACTICE—FINDINGS—EVIDENCE.

Evidence *held* to sustain the findings.

Department 1. Appeal from the superior court of Tulare county.

Brown & Daggett and *D. S. Terry*, for appellant.

Atwell & Bradley, for respondent.

By THE COURT. Appellant avers there was no evidence to sustain the findings of the court below as to the existence of a natural water-

course, known as Outside creek, and that defendant constructed a dam across the channel of that creek and diverted its waters. There was evidence tending to prove that Outside creek was a natural water-course, and that defendant's dam was erected across the stream and operated a diversion. As to the point most insisted upon by appellant, the witness Hyde testified: "I have seen defendant's dam. It is a very well constructed dam. It is across the channel of Outside creek, where the bulk of the waters formerly ran down, and always has since I knew the stream. Its effect is to obstruct the flow of water, and entirely prevent it from flowing down at that point." So the witness Jefferds gave testimony tending to show that defendant's dam was below the People's ditch, and diverted water which would flow to plaintiff's land. There was other testimony to the same effect.

If it should be conceded, upon the facts proved, that the water stopped and diverted by defendant was the overflow from the *People's ditch* into a channel of Outside creek, and that the People's Ditch Company might have diverted the overflow, this would not authorize defendant to divert it, unless it appeared defendant had acquired the right from the People's Ditch Company. Appellant contends the court below erred in sustaining plaintiff's objection to an instrument purporting to be an agreement between defendant and the People's Ditch Company. The corporate seals of the two companies are attached to the instrument, and it is subscribed:

[Corporate seal.]

"BURK MILES,

[Corporate seal.]

"B. F. MOORE.

"President of the Kaweah Canal & Irrigation Company."

The instrument was duly executed by the defendant. No official designation is placed opposite to or below the name "Burk Miles," but the signatures and seals are immediately preceded by the statement: "In witness whereof, the parties hereto have, by their duly-authorized presidents, hereunto signed these presents, and have caused their respective corporate seals to be affixed thereto."

When the common seal of a corporation appears to be affixed to an instrument, and the signatures of the proper officers are proved, courts are to presume that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority. The contrary must be shown by the objecting party. Ang. & A. Corp. § 224. But the corporate seal affixed to a contract or conveyance does not render the instrument a corporate act unless it is affixed by an officer or agent duly authorized. It must be affixed by the officer to whose custody it is confided, or by some person specially authorized; the officer or special agent acting in consequence of the directory vote of the body, or managing board of the corporation, as the case may be. Id. 223. Here it was affirmatively proved that no resolution of the trustees was passed authorizing Burk Miles,

as an individual, or as president, to execute the instrument or attach the seal; that no authority whatever was given him to execute the document. It is true, the presumption of authority to affix the common seal will not be overcome in case of the *cashier of a bank*, by the mere fact that it is proved that there is no vote of the directors on the subject. The same may be true of the acts of similar officials of other corporations. But in the case at bar there was no evidence that Burk Miles was an agent clothed with general powers, which might include the power to execute such an instrument. Indeed, under our law, the power at his discretion to purchase or sell real property could not be conferred upon an agent other than the trustees themselves. No such power is conferred by the statute upon the *president of a corporation*, and there is nothing in our law which would give it by implication.

It is suggested, however, that the evidence shows that the contract was executed. The instrument recites that the Consolidated People's Ditch Company is the owner of a ditch running from the Kaweah river to Johnson's slough, and the defendant of a ditch from the same river to a point where the People's ditch *commences*. Each company conveys to the other one-half undivided of its ditch. It is stipulated that all expenses for keeping the ditches in repair, etc., shall be borne share and share alike; and that after the People's Company has taken a certain quantity of water the defendant may take another certain quantity, if the same is running in the ditches; and further, that any excess shall be equally divided.

Water from the Keweah was first appropriated by the People's Company, and the evidence does not show that the event ever occurred which authorized defendant to use any of the water. It cannot be said, therefore that the People's Company is estopped from denying the right of the defendant from using water from its ditch; certainly there is no evidence in the transcript from which it appears defendant has acquired a permissive right to dam up the waters flowing below the foot of the ditch. Besides, there is evidence tending to prove that some of the waters whose flow was stopped by the defendant did not come from the People's ditch, and it was for defendant to show what proportion came from that ditch.

Judgment and order affirmed.

65 Cal. 506

McCUE v. TUNSTEAD. (No. 7,306.)

Filed August 18, 1884.

EXEMPT PROPERTY—HORSES—STALLION.

A person engaged in husbandry is entitled to exemption from execution of two horses, if the same be used by him in such husbandry, the value and gender of such horses being immaterial. The fact that one of such horses may be used at times as a stallion for breeding purposes, for hire, if such horse is used in husbandry, does not affect such exemption.

In bank. Appeal from the superior court of Marin county.

J. S. McCue, for appellant.

T. J. Crowley, for respondent.

SHARPSTEIN, J. The court found in substance that the plaintiff was the owner and in the possession of a farm of about 150 acres of land, which he cultivates for raising grain, etc., and that the horse which this action was brought to recover was used as a work-horse on said farm,—sometimes singly and sometimes doubly. It is also found that the plaintiff is the publisher of a weekly newspaper and the proprietor of patent medicines, although his main reliance for support is upon his farm, “and almost the entire income from that is from the services of said horse as a stallion, and the agistment of mares for breeding to him.”

The plaintiff is the owner of other horses pledged for a debt owing by him, and in the possession of the pledgee. In addition to “the farming utensils or implements of husbandry of the judgment debtor,” the law exempts from execution *two horses*. Code Civil Proc. 690, subd. 3. The findings establish beyond doubt that the plaintiff employed this horse in husbandry. He was a farm-horse in the same sense that the plows, harrows, and wagons used on the farm were utensils or implements of husbandry. And husbandry is the business of a farmer, comprehending the various branches of agriculture. The plaintiff resided on a farm with his family, cultivated it, and mainly derived his support from it. Did not that constitute him a farmer? The horse taken from him was one of two used in the tillage and cultivation of said farm. We think the gender of the animal quite immaterial. His mate may have been of the opposite gender, and chiefly valuable as a brood-mare. If so, it might be urged that she was not exempt, with quite as much force as it is now urged that the stallion is not.

On the questions of the value and gender of the horses used in husbandry the Code is silent. It is restrictive as to the number and use only. If the plaintiff is engaged in husbandry, he is entitled to the exemption of two horses, if the same be used by him in such husbandry, the value and gender of which are immaterial. The findings of the court, in our opinion, establish two propositions: (1) That plaintiff is a farmer; and (2) that the horse which he claims as exempt

was one of two which he used on his farm in the cultivation and tillage thereof.

Judgment reversed, with directions to the court below to enter judgment in favor of the plaintiff on the findings.

We concur: MCKINSTRY, J.; MYRICK, J.; THORNTON, J.

I dissent: ROSS, J.

65 Cal. 508

DAY v. COHN. (No. 9,498.)

Filed August 22, 1884.

1. STATUTE OF FRAUDS—PAROL CONTRACT TO CONVEY LAND—PART PERFORMANCE—SPECIFIC PERFORMANCE.

Possession of a lot of land under a parol contract for the sale thereof, and the expenditure of money in the improvement thereof, and partial payments of the price stipulated to be paid for it, constitute part performance of the contract, which takes it out of the statute of frauds, and entitles the vendee to specific performance of the contract, unless the granting of such relief would, under the circumstances of the case, be inequitable.

2. SAME—FINDINGS SUSTAINED.

Evidence *held* to sustain the findings.

Department 1. Appeal from the superior court of Butte county.

Reardon & Freer, for appellant.

Park Henshaw, for respondent.

MCKEE, J. The contention that the decree in this case is erroneous, because it is based upon conclusions of law not supported by the findings, and drawn from findings not sustained by the evidence, is not maintainable. The action was to enforce the specific performance of a parol agreement to convey the legal title to a town lot. The record of the case shows that the plaintiff proved the agreement as averred in his complaint; that under the agreement he entered into possession of the lot, by and with the consent of his vendor, and expended several hundred dollars in building upon it a dwelling-house and outhouses, which were occupied by himself and his tenants; and that, during his occupancy, he made occasional payments upon the purchase price of the lot, which were accepted by the vendor on account, and the balance he tendered and demanded his deed; and he still was ready and willing to pay what was due, but the defendant, to whom the lot had been conveyed by the vendor, refused to accept the money or to execute a deed. Possession of a lot of land under a parol contract for the sale thereof, the expenditure of money in the improvement thereof, and partial payments of the price stipulated to be paid for it, constitute part performance of the contract, which takes it out of the statute of frauds, (Code Civil Proc. § 1972,)

and entitles the vendee to specific performance of the contract itself, unless there are circumstances in the case which would render it inequitable for a court of equity to grant relief. There is nothing in the circumstances of the case which shows laches on the part of the plaintiff in the performance of the agreement. No definite time was named for the payment of the price to be paid. By the terms of the agreement the money was to be paid from time to time, "as the plaintiff earned the same." Time, therefore, was not of the essence of the agreement; nor was it made so by notice or demand for the payment of the money at any particular time. The vendor was content to let it remain, bearing interest, and he always accepted any payments which were made by the plaintiff in performance of the agreement. The last of such payments was made in 1881, two years before the commencement of the action in hand. There was, therefore, no repudiation or abandonment of the contract by the plaintiff; and as he was all the time, until the conveyance to the defendant, in the actual possession of the lot under the contract, his equitable right to compel performance of it was not barred by the statute of limitations. *Love v. Watkins*, 40 Cal. 547; *Willis v. Wozencraft*, 22 Cal. 608; *Millard v. Hathaway*, 27 Cal. 119. When the defendant obtained the title to the lot by the deed from his grantor, he took it with notice of the agreement on the part of his grantor to convey the title to the plaintiff. He therefore held the same in trust for the plaintiff, and was bound to convey it to him upon payment of the balance of the purchase money due upon the agreement.

There was no prejudicial error in the refusal to admit testimony to prove that the plaintiff had several times "earned the money" and was able to pay, but unreasonably delayed payment. The vendor acquiesced in the delay, and waived any default caused by it. He never claimed to make non-payment the basis of a forfeiture of the plaintiff's rights under the agreement. On the contrary, he recognized them when he conveyed to the defendant the legal title to the lot; for, needing the money, he conveyed the lot for the unpaid balance due by the plaintiff under the agreement, upon the promise made by the defendant that he would convey it to the plaintiff upon payment by the latter of what was due and owing upon the agreement. To permit the defendant, under these circumstances, to withhold the legal title from the plaintiff would be to aid him in perpetrating a fraud. *Farley v. Vaughn*, 11 Cal. 227.

Judgment and order affirmed.

We concur: ROSS, J.; McKINSTRY, J.

65 Cal. 510

STRETCH v. TALMADGE. (No. 8,616.)

Filed August 22, 1884.

PARTNERSHIP—DISSOLUTION—ACCOUNTING.

In an action for dissolution of partnership and for an accounting, if there has been a partial settlement between the partners, that fact may be proved, and will be considered valid between the partners themselves, unless assailed on the ground of mistake, error, or fraud.

Department 1. Appeal from the superior court of San Joaquin county.

J. B. Hall, for appellant.

Byers & Elliot, for respondent.

McKEE, J. This was an action for the dissolution of a partnership, and settlement of the partnership accounts. Existence of the alleged partnership was denied. But the court found that in the year 1876 plaintiff and defendant entered into a partnership to manufacture and sell bricks, the profits and loss of which were to be divided equally between them; that under the articles of partnership there was manufactured between the months of March and September, 1876, two kilns of brick, and these constituted the entire partnership property. The first kiln was sold entire, and the second from time to time, in parcels, until all were disposed of. There were no outstanding debts owing by or due to the firm. The partnership was, therefore, in a condition to be dissolved, and to be wound up. But the partners themselves had made a settlement as to the first kiln. Upon the account stated by them in that settlement, there was found due from the plaintiff to the defendant \$375 for his share of the profits from the sale of the kiln. For that sum the plaintiff gave his promissory note to the defendant, payable on demand, with interest at $1\frac{1}{2}$ per cent. per month until paid. The defendant accepted the same in settlement, and afterwards brought suit upon it to recover the amount due, and that suit was pending at the commencement of the action in hand.

The court ruled that "the business relating to the burning and selling of the second kiln of brick" was the only partnership business unaccounted for and unsettled, and limited the accounting to that kiln. In this, it is said, there was error, because, as neither the settlement, nor the suit pending upon the note given in the settlement, wrought a change of the partnership relations, it was the duty of the court, in an action to dissolve those relations, to take an account of all the partnership affairs from the beginning. It is, undoubtedly, generally true that, in an action to dissolve a partnership and for a settlement of its affairs, the account must be taken from the beginning until the end of the partnership. But if there has been a partial settlement between the partners themselves, that fact may be proved in the action, (*Clark v. Gridley*, 41 Cal. 119;) and, if proved,

the settlement will be considered valid as between the partners themselves, unless it is assailed on the ground of mistake, error, or fraud. Story, Partn. 349. If there is no valid objection to the settlement, it is conclusive upon the parties as far as it goes, and leaves open only the unsettled portion of the account. *Foster v. Rison*, 17 Grat. 321; *Parkhurst v. Muir*, 7 N. J. Ch. 555. There would seem to be no good reason, in the absence of any objection to such a settlement, why it should be reopened. The limitation of the accounting to the second kiln of brick was therefore proper.

The court found that a quantity of the bricks of the second kiln was taken possession of by the defendant and converted to his individual use, and that the value of the plaintiff's share in the same amounted to \$75. This finding is attacked as unsustained by the evidence. But the evidence showed that sales were made from time to time through the years of 1876 and 1877 by the partners respectively, and also by an agent appointed by them for that purpose; and the defendant in his testimony admits that after the agent ceased to act he took possession and disposed of all the bricks that were left. The account of the transactions showed a balance in favor of the plaintiff of \$152.75; and for that amount the court, after decreeing a dissolution of the partnership, gave judgment in favor of the plaintiff against the defendant, without costs. This adjusted and settled the entire partnership affairs, and we find no error in the judgment. Judgment affirmed.

We concur: ROSS, J.; MCKINSTRY, J.

SUPREME COURT OF CALIFORNIA.

65 Cal. 422

BULL, Assignee, etc., v. HOUGHTON and others. (No. 8,148.)

Filed July 22, 1884.

1. INSOLVENCY—APPOINTMENT OF ASSIGNEE—PLEADING—FRAUDULENT PREFERENCE—ACTION BY ASSIGNEE TO RECOVER MONEY.

In an action by an assignee of an insolvent to recover money paid by the insolvent to a creditor with the intent of giving a preference, an allegation that a certain person was appointed assignee by an order duly made is sufficient, without averring that notice was given before such appointment to creditors, or that they did not act, or that the appointee was a competent person.

2. SAME—DEMAND.

In such an action no demand of plaintiff on defendants need be averred or proved.

3. SAME—DUTY OF ASSIGNEE.

It is the duty of the assignee of an insolvent to recover the entire estate, and hold it for the parties interested.

Department 2. Appeal from judgment of superior court of Santa Clara county, in favor of plaintiff, and from order overruling defendant's motion for a new trial.

Houghton & Reynolds, for appellants.

Yoell & Stephens, for respondents.

MYRICK, J. This action was brought by an assignee of an insolvent to recover money paid by the insolvent to a creditor with the intent of giving a preference. The plaintiff had judgment. On the twenty-fifth of July, 1878, Swain, the insolvent, was, under the federal bankrupt law, adjudged a bankrupt, and in August following an assignment of his estate was made. In September, 1879, the United States district court set apart a homestead to him. Thereafter, in the same month, in view of an action for a divorce between Swain and his wife, it was agreed to raise \$1,000 by mortgage of the homestead, and that Swain should take the money as and for his share or interest in the homestead property. This agreement was carried into effect. On the seventh of October, 1879, Swain was indebted to defendants in the sum of \$1,300, and paid them the \$1,000 in part payment thereof. On the twenty-fifth of October, 1879, Swain filed a petition in insolvency under the state law, and such proceedings were had that the plaintiff, Bull, was appointed assignee. In the insolvency proceedings, Swain was discharged of his debts; but the proceedings in bankruptcy still remain undetermined. The petition in insolvency gave the names of two creditors, viz., Pellier, whose debt accrued in 1878, and Stephens, whose debt accrued part before and part after July, 1879, no more certain date appearing.

The appellant's present reasons why the judgment should be reversed:

(1) It does not appear from the complaint that Swain had his domicile or usual residence in Santa Clara county; nor that any schedule was attached to or accompanied his petition; nor that any order was made for creditors to show cause, or that any notice to creditors was given; nor that the petition was verified before the county judge. The complaint avers that Swain, on a day named, filed his petition, duly verified, in the county court of Santa Clara county, alleging his insolvency, and praying to be discharged, and thereupon such proceedings were had that afterwards, on a day named, by an order of said county court duly given and made, plaintiff was appointed assignee of Swain and duly qualified, and still remains as such, and that said insolvent executed and delivered to plaintiff an assignment of his effects for the benefit of his creditors. We think these averments, so far as they relate to the jurisdiction of the county court and its action, bring the case within section 456, Code Civil Proc., and are sufficient. It was not necessary to have averred in the complaint that notice was given to the creditors before the appointment of the assignee, or that they failed to act, or that plaintiff was competent to be appointed; the complaint averred that by an order duly given and made, the plaintiff was appointed—which, under the section above referred to, covers the objections presented by the defendants.

(2) That no demand of plaintiff on the defendants was averred or proved. No demand was necessary. The payment of the money by Swain to the defendants was, under the facts as found, unlawful—no demand was requisite.

(3) That the jurisdiction of the federal court was exclusive as to all claims against Swain which accrued prior to July 25, 1878, the date of the adjudication in bankruptcy. Whatever might have been the rule, if Swain had been discharged in bankruptcy, it is sufficient to say that he was not so discharged. For aught we can say, he may never be so discharged; it may be that all his creditors, both early and late, before the insolvency discharge, may be entitled to share. It is the duty of the assignee in this case to recover the entire estate, and hold it for parties interested.

Judgment and order affirmed.

SHARPSTEIN and THORNTON, JJ., concurred.

65 Cal. 512

PORTER v. MULLER. (No. 8,436.)

Filed August 26, 1884.

1. MORTGAGE—PARTIES TO FORECLOSURE PROCEEDINGS.

The owner of the legal title to land (the equity of redemption at common law) is a necessary party to any foreclosure of a mortgage executed by his grantor.

2. PRACTICE—NEW TRIAL—FAILURE TO FIND MATERIAL ISSUE.

Failure of the lower court to find definitely on a material issue is ground for a reversal and a new trial.

Department 1. Appeal from the superior court of San Joaquin county.

J. H. Budd, for appellant.

E. S. Pillsbury, for respondent.

By THE COURT. 1. By the conveyance from Kroeckel to plaintiff of the former's interest in the mortgaged premises, (of the date of the ninth of November, 1876,) plaintiff became tenant in common with defendant in the lands and premises described in the complaint, the premises continuing charged with the lien of the \$3,000 mortgage executed to plaintiff by Kroeckel and defendant on the second day of September, 1875.

It was found by the court below that on the fifteenth day of December, 1876, plaintiff conveyed the estate and interest in the land and premises so as aforesaid conveyed by Kroeckel to him to one Hiram M. Jones. Jones was a necessary party to an action to foreclose the \$3,000 mortgage, because the owner of the legal title (equity of redemption at common law) is a necessary party to any foreclosure of a mortgage executed by his grantor.

If the arrangement alleged in the complaint to have been made between plaintiff, defendant, Muller, and Kroeckel was not made, or did not operate to release the lien of the \$3,000 mortgage, the judgment of the court below must be reversed. There can be but one action for the recovery of any debt secured by mortgage, and the proceeds of a sale or the whole of the mortgaged premises constituted the primary fund out of which the \$3,000 debt secured by the mortgage was to be paid. C. Civ. P. 726. We cannot order that the judgment be modified so as to direct that the mortgaged premises be sold, because Jones, the owner of the undivided moiety of the equity of redemption, who is a necessary party to a bill to foreclose the mortgage, has not been made a party herein.

2. Are facts alleged in the complaint, and found by the court, which make the defendant personally liable for the whole amount of the \$3,000 debt?

The complaint avers:

"That at the time the said plaintiff became the owner of the said George Kroeckel's interest in said real property, to-wit, on November 9, 1876, there

was, as plaintiff is informed and believes, about 200 acres of the said real property which had been plowed in the spring of 1876 for summer-fallow, and about eighty acres of which was good volunteer ground. That about 250 acres of said real property had then already been sown and cultivated into grain, all of which had been done in a good husbandlike manner, gave good prospects for the coming crop, and was of great value for the farming season of 1876 to 1877 to said real property. That thereupon, in consideration that the said Christ. Muller would give to said plaintiff the one-eighth part of all the grain to be produced for said farming season upon the whole of said real property, and would at his own costs and expense sow and cultivate and furnish seed for all that remained unsown of said land; and at the proper time, and at his own cost and expense, head, thresh, and harvest said crop; and that the said plaintiff might look to said Christian Muller, defendant herein, alone for the payment of the promissory note sued upon in this action, and in subdivision 2 herein mentioned; and that said Christian Muller's interest in said real property should alone be subjected as security to the payment thereof,—the said plaintiff leased to said Christian Muller his interest (acquired by the grant aforesaid) in the said real property for the farming season of 1876 to 1877; and upon the conditions aforesaid the said Christian Muller accepted the said lease and entered into the sole and exclusive possession of all said real property, to have and to hold unto him, the said Christian Muller, until the end of the farming season aforesaid."

In finding 10 the court found that it "was mutually agreed and arranged between the plaintiff, the said George Kroeckel, and the defendant, Muller," that the plaintiff "would also lease to said defendant, Muller, for the farming year of 1876-77 his portion of said premises so conveyed to him by Kroeckel for *one-eighth of all the grain to be raised* upon the whole of said premises described in the complaint, and theretofore belonging to said Kroeckel and Muller," etc.

And in finding 11 the court found:

"The plaintiff also leased on that day to said defendant, Muller, his portion of said premises so to him conveyed by said Kroeckel for the farming year 1876-77, for one-eighth of the grain to be raised upon the whole premises, (plaintiff to furnish sacks therefor,) which lease the defendant then accepted, and thereafter for said farming year remained in exclusive possession of said premises, and farmed the same, and received all the profits thereof, excepting the one-eighth," etc.

Findings 12 and 13 read:

"(12) That on the ninth day of November, 1876, there were about 260 acres of said premises already plowed and seeded, which sowing gave promise of a crop, and was supposed to be valuable; that the said Kroeckel was then the owner of an undivided one-half interest in said crop as the partner of said Muller; that the lease by plaintiff to said Muller of his (plaintiff's) interest in the said land and crop, to him granted by Kroeckel for one-eighth of the whole crop, was a very favorable and desirable one for said Muller, and valuable, and was by him so understood at the time of the making thereof; and said Muller then *considered* and *expected* that he would make sufficient from said lease to indemnify him for his liability upon the \$3,000 mortgage mentioned in the sixth finding hereof, and for the payment of the whole thereof.

"(13) That at the time of such settlement and arrangement and agreement by and between plaintiff, the said George Kroeckel, and said defendant, Muller, in the tenth finding hereof mentioned, and long prior thereto, the defendant, Muller, was aware of the foreclosure proceedings by plaintiff against

said Kroeckel in said court, and in the eighth finding mentioned, and it was on said ninth day of November, 1876, considered by said Muller and Kroeckel that if said proceedings were carried to final judgment and foreclosure sale, the said interest of Kroeckel in the premises mentioned in the complaint herein would not be more than sufficient to satisfy said judgment; and it was also understood that said settlement would be to the benefit of both of said parties, and the said Muller was then informed and understood that his interest in the said premises was liable for the payment of the whole of the note and the mortgage sought to be foreclosed by this action under the lien of said mortgage, and that he, said Muller, would have to pay the same."

The averment in the complaint is that plaintiff leased to defendant, Muller, his undivided moiety of the lands described in the complaint; defendant, as rent therefor, to deliver to plaintiff one-eighth of all the grain produced, for the farming season mentioned, upon the whole of the property, and to assume to pay to plaintiff the whole amount unpaid of the promissory note sued in this action, and that Muller's interest in the land should alone be liable, etc. This contract was entered into by the parties, or it was not. But the uncertain and evasive findings of the court are not determinative of that issue. There is certainly no finding upon the issue, unless it is found in the latter portion of the thirteenth finding—that it "was considered by said Muller and Kroeckel that if said proceedings (proceedings to foreclose the mortgage executed by Kroeckel) were carried to final judgment and foreclosure sale, the said interest of Kroeckel in the premises mentioned in the complaint would not be more than sufficient to satisfy said judgment; and it was also understood that said settlement would be for the benefit of both parties; and the said Muller was then informed and understood that his interest in said premises was liable for the payment of the whole note and the mortgage sought to be foreclosed by this action, and that he, said Muller, would have the same to pay."

In all the elaborate findings there is nothing that can possibly be construed as a finding that defendant, Muller, agreed to assume the sole payment of the \$3,000 note, unless it be discovered in the last words quoted—that Muller *understood* he "would have the same to pay." If he had expressly agreed orally that his co-tenant's share of the land should be relieved of the mortgage, and that his own share should bear the whole burden, such oral agreement would have been of no effect. "A mortgage can be created, renewed, or extinguished only by writing," with certain formalities. Civil Code, § 2922.

The last clause of the finding 13 cannot be construed as a finding that he agreed to pay the whole of the \$3,000 note as part consideration for the occupancy of plaintiff's share of the land. He was "informed and understood" that he would have to pay the note; he was so informed when the "settlement" was made; that is, he was informed and understood that, as a consequence of the settlement and of the fact that a sale of Kroeckel's share of the land (if the foreclosure proceedings against him were continued to sale) would not

bring more than enough to satisfy the individual mortgage of Kroeckel, he, Muller, would have to pay the note. If he was informed and understood that he would become personally liable for the whole \$3,000 note, as the consequence of facts from which no such liability arose, such information and his *understanding* did not make him liable. While the fact that such information was conveyed to him might tend to prove that he agreed to pay the whole debt as part consideration for the lease, there is no finding of the ultimate fact that he agreed to pay the whole debt.

It follows that appellant is entitled to a new trial.

Judgment and order reversed, and cause remanded for a new trial.

65 Cal. 525

WRIGHT v. WARD. (No. 8,899.)

Filed August 26, 1884.

1. PARTNERSHIP—SHERIFF'S SALE OF PARTNER'S INTEREST—ACTION FOR CONVERSION.

A sheriff's sale, at the instance of an individual creditor, of the interest of one member of a partnership, transfers all his interest therein, and there is no conversion of the interest of other partners by a purchase at such sale; but a subsequent sale by him of the whole partnership property, and taking the proceeds to his own use, constitutes a conversion, and the statute of limitations commences to run at that time.

2. SAME—STATUTE OF LIMITATIONS—EVIDENCE—TIME OF CONVERSION.

It is incumbent on a party setting up the statute of limitations as a bar to an action for conversion, to prove the time of the conversion, and that the statute has run against the same.

3. SAME—PARTIES TO BILL AGAINST A PARTNERSHIP.

All partners must be made parties to a bill against a partnership; but if one of the partners be out of the jurisdiction of the court, and the fact is so charged in the bill, the court will, ordinarily, proceed to make a decree against the partners who are within the jurisdiction, if it can be done without manifest injustice to the absent partner.

In bank. Appeal from the superior court of Tehama county.

C. P. Braynard and Chipman & Garter, for appellant.

John F. Ellison and J. Chadbourne, for respondent.

Ross, J. The complaint charges, and the court below, from evidence sufficient to sustain the finding, found the fact to be, that the subject of this action—a certain lot of cattle—was in the year 1876 a part of the property of a copartnership consisting of the plaintiff, Wright, and one Wellington. It is further alleged, and found to be true, that on the twenty-seventh of June, 1876, and during the existence of that copartnership, the defendant, Ward, commenced an action in the late district court of Shasta county against Wellington to recover judgment upon a money demand, in which action a writ of

attachment was duly issued and levied by the sheriff upon Wellington's interest in the cattle, which was followed by the levy of an execution issued upon a judgment that Ward recovered in the action against Wellington, under which all of Wellington's interest in the cattle was duly sold, and the cattle delivered by the sheriff to Ward, who thereupon took them into his possession, and *subsequently*—date not appearing—sold them, and converted the proceeds to his own use. It is averred in the complaint that there has been no settlement of the partnership affairs between the plaintiff and Wellington, but that the partnership is, and at all times mentioned in the record was, free of debts and liabilities, and, further, that during the existence of the partnership, Wellington appropriated to his own use funds of the co-partnership greatly in excess of his interest therein—to such an extent, indeed, as that, upon a settlement of the partnership accounts at the time of the levy upon the cattle, or at the time of their sale by the sheriff under the writ of execution, Wellington would have had no interest as against plaintiff in any of the property then owned by the firm of Wright & Wellington; and these averments of the complaint are, in substance, found to be true by the court below. For which reason the plaintiff claims, and the court below held, that the defendant, Ward, is liable to the plaintiff for the value of the cattle at the time of their sale by the sheriff under the execution in favor of Ward, with interest and costs.

The sheriff's sale, as has been said, occurred on the twenty-seventh of July, 1876. This action was not commenced until the fifteenth of June, 1881, and one of the appellant's points is that the action is barred by the provisions of the statute of limitations. We must hold against the appellant on this point. In levying upon and selling the interest of Wellington in the partnership property at the suit of Ward, an individual creditor of Wellington, neither the sheriff nor Ward was doing anything he did not have a right to do. Indeed, the sheriff was doing what he was obliged to do under the law. In executing his writ the sheriff not only had the right but was bound to take possession of the property, and, in selling the interest of the execution debtor in the partnership property, he rightly transferred the possession of the property to the purchaser, who thereupon became substituted to the rights of the execution partner, *quoad* the property sold, and became a tenant in common thereof, with the right to file a bill, and subject to a bill against him by the other partner, to ascertain the quantity of interest which he acquired by the sale. *Jones v. Thompson*, 12 Cal. 199; *Robinson v. Tevis*, 38 Cal. 615; Story, Part. § 263. There was therefore no conversion of the plaintiff's interest in the property in question by the defendant's purchase at the sheriff's sale. But there was such conversion by the defendant when he subsequently sold the entire property and converted the proceeds to his own use. When that conversion occurred, however, is not made to appear on the record. If it occurred at such time as would bar

the action it was incumbent on the defendant to show the fact, the plaintiff's evidence failing to show that the statute had run.

Upon another point, however, we must reverse the judgment and order appealed from. Wellington was not made a party to the action. To obviate this difficulty the plaintiff alleged in his complaint that about the month of September, 1876, Wellington "left this state, and his whereabouts have ever since been unknown to this plaintiff." The finding is in accordance with the averment. Appellant's position in this particular is based upon an exception to the general rule in relation to parties, which is thus stated in section 78, Story, Eq. Pl.:

"The first exception to the rule which we shall notice is founded upon the utter impracticability of making the new, proper, or necessary parties. This occurs, of course, when such new parties are without the jurisdiction of the court, and when, consequently, they cannot be reached by the process of the court. In such a case, to require such persons to be made parties would be equivalent to a dismissal of the suit, and amount to a denial of justice. Hence, it is a common rule of the court that when a person who ought to be a party is out of the jurisdiction of the court, if the fact is stated in the bill and admitted by the answer, or proved (if denied) at the hearing, that, of itself, constitutes a sufficient ground for dispensing with his being made a party, and the court will proceed to a decree without him. Thus, for example, the general rule is that, to a bill against a partnership, all the partners must be made parties. But if one of the partners be resident in a foreign country so that he cannot be brought before the court, and the fact is so charged in the bill, the court will ordinarily proceed to make a decree against the partners who are within the jurisdiction; with this qualification, however, that it can be done without manifest injustice to the absent partner."

An important qualification ingrafted on this exception, as said in a subsequent section of Story,—section 81,—is, "that persons who are out of the jurisdiction, and are ordinarily proper and necessary parties, can be dispensed with only when their interests will not be prejudiced by the decree, *and when they are not indispensable to the just ascertainment of the merits of the case before the court.*"

In the case at bar, the liability of the defendant to the plaintiff confessedly depends upon the *status* of the partnership accounts between plaintiff and Wellington. If upon an adjustment of those accounts it should turn out that at the time of the sheriff's sale of the cattle to defendant, Ward, there was no residuum in Wellington, Ward got nothing by his purchase, and his subsequent conversion of the property rendered him liable to the plaintiff. But it is equally true that if upon an adjustment of the partnership accounts between Wright and Wellington it should turn out that there was no residuum in Wright, the reverse would follow. As the liability of the defendant depends on the settlement of the partnership accounts between the plaintiff and Wellington, it seems quite clear that the latter is an essential party to the action.

Young v. Hogle, 52 Cal. 466, is in point; and a case standing analogous reasoning is *Roveray v. Grayson*, 3 Swanst. 145, note.

Judgment and order reversed, and cause remanded for a new trial,

We concur: SHARPSTEIN, J.; MCKINSTRY, J.; MYRICK, J.

We concur upon the ground that Wellington was not made a party; THORNTON, J.; MCKEE, J.

65 Cal. 522

PEASLEY v. HART. (No. 9,527.)

Filed August 26, 1884.

1. CONTRACT TO CONVEY LAND—SPECIFIC PERFORMANCE.

A court of equity will compel specific performance of a contract by a person to convey land, against his grantee who took merely the legal title, with notice of the equitable right of another person to a conveyance of such land to him.

2. SAME—CONDITION PRECEDENT.

Where the performance of an executory contract by one party depends upon something to be previously done by the other, an action will not lie for non-performance if default has been made in the accomplishment of the preceding act.

3. SAME—LEGAL VARIANCE.

Where there is no difference between the allegations and the proofs as to a contract to convey, but there is a difference as to the quantity or extent, this does not constitute a legal variance.

Department 1. Appeal from the superior court of El Dorado county.

O. P. Hart, for appellant.

M. P. Bennett, for respondent.

MCKEE, J. At the commencement of the action of ejectment, out of which this case arises, the defendant was in possession of the demanded premises, under a written contract between himself and the grantor of the plaintiff for a conveyance of the legal title. The case is this: In the year 1878 one Ensey applied to purchase from the government of the United States a tract of public land. At the same time the defendant had pending an application to purchase a part of the same land, of which he was then in possession, and had been for several years before, claiming it as his own. To avoid a contest between the two applicants it was agreed that the defendant would withdraw opposition to Ensey's application, and that Ensey, in consideration thereof, when he procured the patent for the land from the United States, would convey to the defendant the legal title to his part of the land, upon payment by him of the government price per acre and a just proportion of the expenses incurred in procuring the patent. Contemporaneously with the execution and delivery of this agreement, Ensey executed and acknowledged a deed which purported to convey the land to the defendant, and was to be delivered to him

after the issuance of the patent, upon payment of the purchase money and his proportion of expenses, according to the terms of the contract. On the fifteenth of September, 1882, Ensey obtained his patent; but, instead of notifying the defendant of its issuance, or of the amount of money paid for the land and of the expenses incurred in procuring the patent, and without tendering the deed which had been executed to be delivered on payment of the money, he conveyed the defendant's land by deed to the plaintiff. When the plaintiff received his deed, he took it with knowledge of the fact that defendant was in the actual possession of the land, and (according to the averments of the cross-complaint, which are not sufficiently denied by the plaintiff's answer to raise an issue as to them) with notice that the defendant claimed title to the land under his agreement with Ensey. Having thus obtained the dry legal title to the land with notice of the defendant's equitable right, the plaintiff was bound by the agreement between his grantor, Ensey, and the defendant to convey to the defendant the legal title; and equity will compel him to convey, unless the defendant has repudiated the agreement or refused to perform it, or there are circumstances which would render it inequitable to compel performance.

There was no proof of repudiation or refusal. Defendant averred his readiness to perform, and offered to pay the amount of the purchase money due upon the agreement, whenever the same was ascertained, and he asked, as equitable relief, specific performance, "upon such conditions as to the court might seem meet and proper, and for such other and further relief as might be deemed equitable and just." This was sufficient to entitle the defendant to relief, if the agreement was capable of being performed. The agreement was capable of performance; it was in writing, founded upon a valuable consideration, certain in its terms, mutual in its obligations, and was otherwise fair and just. Time was not of its essence, for there was no day named for the payment of the purchase money. The money was to be paid upon the happening of an event, which would become known, first of all, to the vendor; and when it became known to him, by the receipt of his patent, he, as the trustee of the title for the defendant, was bound, under his agreement, to notify the defendant of the issuance of the patent, and of the amount of the purchase money to be paid by the defendant under the agreement for the delivery of the deed, which had been executed and acknowledged, and was to be delivered upon the ascertainment and payment of the purchase money.

The performance of these things by Ensey was a condition precedent to the right by him or his grantee to insist upon payment by the defendant. Where the performance of an executory contract by one party depends upon something to be previously done by the other, an action will not lie for non-performance if default has been made in the accomplishment of the preceding act. You must first perform your own part, or show a readiness and willingness to do so, before

you can put the other party in fault for non-performance, or create a forfeiture of his rights under the contract. *Barron v. Frink*, 30 Cal. 488; *Hill v. Grigsby*, 35 Cal. 656.

As, therefore, the defendant was not in fault, and was ready and willing to perform the contract, by paying for his land when the amount to be paid was ascertained, he was entitled to a judicial ascertainment of the amount, and to specific performance.

But the court refused specific performance upon the ground that there was a variance between the agreement proved and that alleged in the cross-complaint. The cross-complaint alleged that the parties duly entered into a contract, by the terms of which Ensey, in consideration of the withdrawal of opposition to his application to purchase a tract of land from the United States, agreed "to deed and convey" the part of said land occupied by the defendant as soon as he should receive a patent therefor from the United States, upon payment by defendant "of the price said Ensey should pay the government therefor." The evidence showed, and the court found, that Ensey agreed "to deed and convey, after obtaining his patent, upon payment of the price paid to the government, and also such proportion of the expenses of obtaining the patent as the number of acres in possession of the defendant would bear to the whole number of acres in the tract described in the patent." The allegations and the proofs were not in fact identical, but they sufficiently corresponded in respect of the facts which constituted the defendant's claim to relief in equity; that is, that the plaintiff's grantor had contracted to convey the legal title to the defendant upon payment by him of the purchase money of the land according to the terms of the contract between them. There is no difference between the allegations and the proofs as to the contract to convey, but there is a difference as to the amount of money to be paid; and as that was a difference only in quantity or extent, it did not constitute a legal variance, for it could not have misled the plaintiff to his prejudice in maintaining his defense upon the merits to the defendant's cross-complaint. Code Civil Proc. § 469. Nor did it operate in any way to prevent the court from ascertaining the amount paid for the land, and the expenses incurred in procuring title to it, and from adjudging the relief to which the parties were entitled.

Judgment and order reversed, and cause remanded.

We concur: McKINSTRY, J.; ROSS, J.

65 Cal. 329. *SWEETZER v. DOBBINS.* (No. 8,494.)

Filed August 26, 1884.

1. PRACTICE—VERDICT IN EQUITY CASE—EFFECT OF.

The verdict of a jury with respect to controverted facts arising in an equity case is not conclusive upon the questions submitted, but merely advisory in its character, and the judge may, when satisfied that truth and justice require it, set aside the verdict and order a new trial, or may qualify or alter any of its special findings, or disregard it, in whole or in part, and find the facts for himself; or he may approve them in whole or in part, and if approved they become by adoption the finding of the court.

2. SAME—JUDGMENT—CONFLICT OF TESTIMONY.

Where there was a substantial conflict in the evidence, the judgment of the lower court will not be disturbed.

3. SAME—FINDINGS.

Findings held to sustain the judgment.

In bank. Appeal from the superior court of Solano county.

George A. Lamont and George A. Nourse, for appellant.

J. McKenna, Wendall & Kelley, and *A. J. Dobbins*, for respondent.

MCKEE, J. This was an action on the equity side of the court for the reformation of a deed. Questions were framed and submitted to a jury, the answers to which were returned and filed as a special verdict. No order was made setting aside the verdict; but as appears from the record, the court, "upon the verdict and the testimony in the case," made and filed a written decision, in accordance with sections 632 and 633 of the Code of Civil Procedure, in which it found as fact that the deed sought to be reformed truly expressed the intention of the parties to it, and there was no mistake in its execution, and therefore, as a conclusion of law, the defendant was entitled to judgment. Upon a certified statement of the case, the plaintiff moved for a new trial, on the ground that the verdict and decision were not sustained by the evidence, and of error of law occurring at the trial; and from an order denying the motion this appeal is taken.

The principal assignment of error is that the court erroneously instructed the jury as to the degree of evidence requisite to prove the facts involved in the issues submitted to them. Appellant contends that by subdivision 5 of section 2061, Code Civil Proc., the legislature has changed the rule of the old courts of equity as to the proof necessary to establish the issue in an action for the reformation of a deed or other instrument in writing, and that now, under the working of the Code rule, instead of having to prove the fact at issue, by evidence clear and convincing, or beyond a reasonable doubt, as the court charged the jury in the case, it is only requisite to prove it by a preponderance of evidence. But the questions invoked by the contention do not necessarily arise out of the record; for although special issues were submitted to the jury that, under the instructions of

the court, returned the verdict, yet the verdict, and the instructions upon which it may be said to have been predicated, were disregarded by the court in the determination of the case; and the action of the court in that regard was not error. For, as has been repeatedly held before and since the adoption of the Codes, the verdict of a jury, with respect to controverted facts arising in an equity case, is not conclusive upon the questions submitted, but merely advisory in its character; and the judge may, when satisfied that truth and justice require it, set aside the verdict and order a new trial, or may qualify or alter any of its special findings, or disregard it, in whole or in part, and find the facts for himself; or he may approve them in whole or in part, and if approved they become, by adoption, the findings of the court. It was therefore a proper exercise of authority for the judge in this case to examine the evidence in the case for himself and determine the question at issue between the parties according to the weight of evidence, notwithstanding the proceedings taken with the jury and the verdict returned. And having, in the exercise of that authority, made and filed his written decision, in which the facts found corresponded with the verdict of the jury, error cannot be predicated of his findings, if they are sustained by the evidence, notwithstanding the previous instructions to the jury; for, having the right to disregard the verdict, he had also the right to disregard the instructions to the jury that rendered the verdict. It is true that the decision of the court and the verdict of the jury were in harmony; but the decision of the court is the judgment of the court; and this judgment was warranted by the evidence, or it was not. If it was not, a new trial should be granted. If it was, it cannot be reversed, except upon other grounds.

Appellant concedes there was a substantial conflict in the evidence upon which the court rendered its decision. That being the case, we must accept the facts found by the court to have been satisfactorily proved, and if the court has logically drawn from them the legal conclusion upon which its judgment is founded, it cannot be predicated of the decision or finding that it is not sustained by the evidence or that it is against law.

Accepting the finding of the court as conclusive of the facts, the decision of the court is unquestionable. The judgment entered follows the decision. Allegations and proofs, findings and judgment, therefore, agree, and there is no error in the record of which we can take cognizance. *Still v. Saunders*, 8 Cal. 287; *Wilson v. Wilson* 12 Pac. C. L. J. 118.

Judgment and order affirmed.

We concur: MYRICK, J.; SHARPSTEIN, J.; ROSS, J.; MCKINSTRY, J.; MORRISON, C. J.

65 Cal. 519

MOORE v. KERR and others. (No. 9,143.)

Filed August 26, 1884.

CONTRACT—WORK TO BE APPROVED BY THIRD PARTY.

Where by contract parties agree that one of them is to do certain work at a fixed price, the work to be done to the satisfaction of a certain individual, his judgment as to such work is conclusive, and the parties are not allowed to go behind it, in the absence of fraud or mistake.

Department 2. Appeal from the superior court of San Joaquin county.

J. C. Campbell, F. T. Baldwin, and W. R. Davis, for appellant.

J. A. Louttit and Byers & Elliot, for respondent.

THORNTON, J. The contract under which the plaintiffs claim was found by the court as follows:

"This agreement, made and entered into this twenty-sixth day of July, A. D. 1880, by and between the California Bridge Company, of Oakland, Cal., party of the first part, and Gardner Day, M. E. Bryant, J. C. Kerr, D. J. Locke, George Ringer, Isaac Rogers, G. C. Holman, J. Cotton, and George S. Locke, all of San Joaquin county, Cal., parties of the second part, witnesseth: That the said bridge company hereby agrees to furnish all materials for and construct a bridge over the Mokelumne river, at the town of Lockeford, in said San Joaquin county, in accordance with the plans and specifications therefor adopted by the board of supervisors of said county, and on file with the county clerk of said county; said bridge to be built under the direction and to the satisfaction of the superintendent appointed by said board, in good and workmanlike manner, and to be completed within four months from date. In consideration of which, the said parties hereby agree to pay, or cause to be paid, to the said first party, the just and full sum of forty-five hundred (\$4,500) dollars, gold coin, or equivalent, (in addition to the fifteen hundred dollars which is to be paid said company by said county towards the construction of said bridge,) said sum to be paid as follows, viz.: When all the materials are on the ground, and all the piles are driven, then the sum of three thousand (\$3,000) dollars shall be paid, and the balance shall be paid upon the completion and delivery of said bridge to said San Joaquin county. It is hereby understood and agreed that said bridge is to be built for a free bridge for San Joaquin county, and is to be delivered to said county when completed. It is hereby further agreed that said bridge shall consist of one span of 130 feet on the main channel, and 620 feet of trestle-work.

"In witness whereof, the parties hereto have hereunto set their hand and seal the day and date first above written.

[Seal.]

"THE CALIFORNIA BRIDGE CO.,

"By ALFRED W. BURRELL, President.

[Seal.]

"J. C. KERR.

[Seal.]

"D. J. LOCKE.

[Seal.]

"GEO. RINGER.

[Seal.]

"ISAAC ROGERS.

[Seal.]

"G. C. HOLMAN.

[Seal.]

"J. COTTON.

[Seal.]

"GEORGE S. LOCKE.

[Seal.]

"GARDNER DAY.

[Seal.]

"M. E. BRYANT.

"It is hereby agreed that such person as the committee shall designate shall act, in conjunction with Supervisor Perrott, in superintending the construction of said bridge, and that additional trestle-work proposed within 30 days shall be added to the above contract at the rate of five dollars per lineal foot.

"ALFRED W. BURRELL,
"President C. B. Co."

"LOCKEFORD, July 26, 1880.

"The building committee of the Lockeford bridge hereby agree to the building of the amount of trestle-work as specified in the plans and specifications as submitted to the board of supervisors, and on file in their office, making a total of 820 feet of trestle-work; payment to be made in accordance with the contract herein.

G. C. HOLMAN.

"D. J. LOCKE.

"J. C. KERR.

"M. E. BRYANT."

The work by the contract was to be done, under the direction and to the satisfaction of the superintendent (John Perrott) appointed by the board of supervisors of San Joaquin county, in a good and workmanlike manner. The work was done to his satisfaction, and it was so found. It does not appear that there was any fraud or mistake on the part of Perrott. His judgment is therefore conclusive, and the defendants are not allowed to go behind it. *Smith v. Brady*, 17 N. Y. 177; *Wyckoff v. Meyers*, 44 N. Y. 145; *Stewart v. Keteltas*, 36 N. Y. 392; *Hudson v. McCartney*, 33 Wis. 340. The balance due under the contract (\$3,000 having been paid) was to be paid upon the completion of the work and delivery of the bridge to San Joaquin county. This was done on the twenty-seventh of November, 1880, and substantially so found. The other facts found, in our view, are immaterial, as the defendants are concluded by the judgment of Perrott. The plaintiffs have a right to recover the balance under the contract, viz., \$1,500, with interest from the twenty-seventh day of November, 1880, the day of the delivery of the work, since which time it has been a free county bridge.

There was no error in not finding as to the extra work. This was not assigned to the plaintiffs.

The judgment is reversed and the cause remanded, with directions to enter judgment for the plaintiffs for the balance due, as above indicated.

We concur: MYRICK, J.; SHARPSTEIN, J.

2 Cal. Unrep. 359

LAWRENCE and others v. GETCHEL. (No. 9,093.)

Filed August 26, 1884.

1. PRACTICE—COSTS.

Where the issue is found against the plaintiffs they are not entitled to recover any costs or disbursements incurred in the action.

2. PLEADING—ALLEGATIONS—RELIEF.

The pleadings of a party to whom relief is granted must be sufficient to warrant the relief. Where plaintiff, therefore, does not allege that defendant asserts any claim to his property, he is not entitled to a judgment restraining defendant from asserting such a claim.

In bank. Appeal from the superior court of Nevada county.

Cross & Simmons, for appellants.

W. A. Long and J. M. Walling, for respondent.

By THE COURT. The plaintiffs' complaint can only be construed as one to obtain an injunction restraining the defendant from the commission of the acts complained of. Upon the cause of action, and the only cause of action set forth in the complaint, the court below found against the plaintiffs. The plaintiffs were not therefore entitled to recover of the defendant any costs or disbursements incurred in the action. Nor, under the pleadings, were the plaintiffs entitled to judgment restraining the defendant from asserting a claim to any part of the property described in the complaint; for the plaintiffs nowhere allege that the defendant asserts any such claim. It is a cardinal rule that the pleadings of a party to whom relief is granted must be sufficient to warrant the relief.

Cause remanded, with directions to the court below to modify the judgment in accordance with the views here expressed.

McKEE, J. I concur in the judgment.

SALISBURY and others v. BROWN. (No. 9,213.)

Filed August 26, 1884.

PRACTICE—JUDGMENT—CONFLICTING EVIDENCE.

Where there is a substantial conflict in the evidence, the judgment of the lower court will not be disturbed on the ground that the evidence was insufficient to justify the verdict.

Department 2. Appeal from the superior court of San Joaquin county.

Baldwin & Smith and Campbell & Muentner, for appellant.

Louttit & Lindley, for respondent.

By THE COURT. In this case there is a substantial conflict in the evidence, and therefore we cannot reverse the order denying a new

trial on the ground that the evidence was insufficient to justify the verdict.

We find no error in the record, and the judgment and order are affirmed.

65 Cal. 532

PEOPLE v. MOAN. (No. 10,971.)

Filed August 27, 1884.

1. CRIMINAL LAW AND PROCEDURE—EVIDENCE—OPINION.

The opinion of a witness as to what was meant by a certain statement of one of the witnesses, which statement was not matter for expert testimony, was inadmissible. It was for the jury to determine what was meant, and the meaning was to be gathered from the relation of the parties, the language employed, and all the surrounding circumstances.

2. SAME—RULINGS ON IMMATERIAL MATTERS.

A defendant in a criminal case cannot, on any reasonable hypothesis, sustain injury by erroneous rulings of the court on matters entirely immaterial.

3. SAME—REPUTATION OF DEFENDANT.

Where the defendant's good reputation has been fully established, and the prosecution has offered no evidence to impeach it, an objection to questions as to defendant's reputation is properly sustained.

4. SAME—EXAMINATION OF WITNESS—DISCRETION OF COURT.

Where a witness was on the stand, and the court, having asked whether the counsel desired to ask any further questions, received no answer, and thereupon dismissed the witness, and refused to allow him to be recalled, *held*, that such matters rest in the discretion of the court, and, in absence of a clear abuse of discretion, will not be interfered with on appeal.

5. SAME—OBJECTIONS TO QUESTIONS ON APPEAL.

Where an objection was made in the lower court it is too late on appeal to object that a question was asked which was hypothetical in its nature, and not founded on the evidence.

6. SAME—MURDER—DISEASE AS CAUSE OF DEATH.

On an indictment for murder, if it is proven that the death was accelerated by the violence of the prisoner, his guilt is not extenuated, although death might be, and probably would have been, the result of the disease which then afflicted the deceased.

Department 1. Appeal from the superior court of the city and county of San Francisco.

E. M. Gibson and *W. Whitmore*, for appellant.

The Attorney General, for respondent.

MORRISON, C. J. The defendant was convicted in the superior court of the crime of manslaughter, and was adjudged to serve one year's imprisonment therefor. On this appeal numerous errors are assigned, which we will dispose of in the order of their presentation.

1. The first error assigned is to the ruling of the court in refusing to allow a question asked a witness by defendant, and appears on page 42 of the transcript. The witness had stated that one Thomas had told him (witness) to go and get the wood, and he would stand the consequences. Witness was asked what Thomas meant by the expression that "he would stand the consequences." If the inquiry had

any bearing on the case; (and we do not see how it had,) the objection to the question was properly sustained. It was not a matter for expert testimony, and the opinion of the witness as to what was meant was inadmissible. It was for the jury to determine what Thomas meant, and the meaning was to be gathered from the relation of the parties, the language employed, and all the surrounding circumstances.

2. The second point is found on page 48 of the transcript. A witness was asked, "Did you see Mrs. Finck raise part of buck or buck-saw to strike Moan?" The court, in ruling on the objection of the question, remarked that it "did not see what figure it could cut in the case;" and we, too, fail to see, under the circumstances appearing in the case, what bearing the inquiry had on the question of guilt or innocence of the defendant. If Mrs. Finck had raised the buck-saw to strike Moan, such action on her part would not have had any bearing on the question of Moan's guilt.

3. The third point is equally immaterial. A witness was asked, "What is your opinion as to Finck's mental sanity that afternoon?" The question of Finck's sanity on Saturday afternoon had so little, if any, bearing on the case that the ruling of the court on the question does not, in our opinion, merit serious consideration.

4. The fourth objection involves the correctness of the ruling of the court on the following question: Defendant asked the witness Dicker, "Is it not a fact that during the two years that you were acquainted with Finck that he was in the habit of using intoxicating liquors to excess?" The prosecution objected to the question, and the objection was sustained. Defendant assigns the ruling as error. There are two answers to the objection: In the first place, it is wholly immaterial what Finck's habits were, as the law makes it as criminal to take the life of a drunkard as a sober man; and, in the second place, if in any point of view the inquiry could have any bearing on the case, Finck's habits were fully established by the uncontradicted evidence of numerous witnesses, as well as by the autopsy in the case. Defendant could not, on any reasonable hypothesis, have sustained injury by an erroneous ruling of the court on the question.

5. The next point is found on page 68 of the transcript. One White was on the stand and was asked the following question: "I will ask you if you know what the defendant's general reputation was in the community in which he resided for peace and quiet?" The ruling of the court sustaining an objection to the question is assigned as error; but there are two answers to the point: In the *first* place, the witness had already stated that he had never heard the defendant's reputation for peace and quiet discussed; and, *secondly*, the defendant's good reputation was fully established by the testimony of a *great many* witnesses, and the prosecution offered no evidence to impeach it.

6. We now reach a more formidable objection to the proceedings, and one which on first impression seemed fatal. One Victor de Parys was examined as a witness, and before he was dismissed the following colloquy occurred between the court and counsel in the case:

"The Court. Are there any further questions of this witness?

"Counsel for defendant replied: 'We are consulting.'

"The Court. I am going down to department three to do a little business, and you can consult meantime.

The judge retired from the room a few minutes, and on his return said:

"The Court. Are there any more questions of this witness? (No answer.)

This question was spoken in the usual, audible tone of voice of the judge. At this time Mr. Brearty, one of counsel for defendant, was sitting at a table about fifteen feet distant from the judge, who was upon the bench, and the other counsel, Mr. Gibson, was standing by the clerk's desk, about nine feet distant from the judge, talking with a person.

"The Court. Mr. De Parys leave the stand.

The witness arose and was leaving the witness stand when Mr. Gibson said:

"Mr. Gibson. We desire to ask the witness a few more questions.

"The Court. I don't know that I will allow him to be recalled at all.

"To which ruling of the court defendant duly excepted, and assigns the same as error."

Afterwards the following transpired in this connection:

"Mr. Brearty. Did I understand the court to rule that we cannot recall the witness De Parys?

"The Court. When I left the court-room to go down into department three you were asked if you had any more questions to put to him; you said you were consulting. I went down in department three on some business, and when I returned Mr. De Parys sat on the stand. I asked you and your associate counsel if you had any more questions to put to this witness.

"Mr. Brearty. I declare I didn't hear it.

"The Court. You declined to reply. I then said, 'Mr. De Parys, leave the stand.' I decline to allow you to recall him.

"Mr. Gibson. I will say to your honor, in explanation for myself, that at that instant there was a witness here who was urgent to leave and insisted on talking.

"The Court. The court proposes to run its business according to the demands of the occasion, and somebody else must give way; that is all. I don't propose to wait upon the opportunity of counsel and the inclination of counsel or the inclination of somebody else on the outside. We have to do business here, and it has to be done; that is all.

"Mr. Gibson. We would like to ask him another question or two; it will only take a minute or two.

"The Court. Well, it is not the first time during the trial of this case that I have spoken to counsel on your side without reply, and I don't propose to be treated in that way any longer. Now, then, go on.

"To which ruling of the court, in not permitting the witness De Parys to be recalled, defendant duly excepted, and here now assigns the same as error."

We think it would have been the better practice to permit the recall of the witness De Parys, but cannot say that there was such an abuse of discretion on the part of the court as would justify a reversal.

The witness had been on the stand twice, once for the people and then for the defense, and if a further examination was demanded by the defense it was at least proper for the counsel to show to the court what he expected to prove further by the witness, and to show some good reason why he had not proved it before. The judge evidently thought the court had been trifled with, and, perhaps, there was some reason for the action of the judge on the occasion. In speaking upon a similar question the court, in the case of *People v. Keith*, 50 Cal. 140, says: "But, necessarily, such matters must rest greatly in the discretion of the court below; and it is not our practice to interfere in such cases, except where there has been clearly an abuse of discretion." Considering all the circumstances surrounding the action of the court in the case, we are not prepared to say that the record exhibits such an abuse of discretion as calls for a reversal of the judgment.

7. The seventh ground of alleged error is that the court allowed a hypothetical question which was not founded on the evidence, inasmuch as the evidence did not show that the defendant weighed 200 pounds. It is true that there is no evidence relating to the size of the defendant, but no objection to the question was made on the ground that it assumed that defendant weighed 200 pounds, and we think it too late to make it on appeal. See transcript, p. 91.

8. We think the eighth objection untenable, but it is unnecessary to enlarge upon it. If the hypothetical question did not embrace all the facts, it was a very simple matter to frame one that did.

9. The ninth raises a question of the insufficiency of the evidence to justify the verdict. There is no doubt that the defendant struck the deceased at least one, and perhaps two, blows on the head. This was on Thursday. The deceased was taken in a dazed and bloody condition to the physician, by whom he was treated, and on the following Tuesday he died. The claim on the part of the defendant is that it was not the injury but chronic alcoholism that caused the death. There was some conflict in the evidence on this point; that the organs of the deceased, including brain, stomach, kidneys, and liver, were in a very unhealthy condition, clearly appears from the evidence, but that the immediate cause of death was the blow or blows is abundantly established. It was the province of the jury, under the instructions of the court, to say whether the death of Finck resulted from violence or natural causes, and we cannot say that the evidence preponderated on the latter side rather than the other. It is sufficient for us to see that there was evidence in the case to support the verdict of the jury, and this we think there was.

A question is made on that portion of the charge to the jury instructing them that if the blows accelerated the death of Finck, defendant was responsible. Such we understand to be the law of homicide. If a patient is lying in the last stages of consumption, with a tenure upon life that cannot possibly continue for a day, it is homicide to administer a poison to him by which his life is ended almost

immediately. So, in the case we are now considering, if Finck, by excess in indulgence in alcoholic drinks had reduced himself to a wreck, and brought his life to the verge of the grave, it was a wrongful act for the defendant to accelerate his death by violence. Perhaps blows, delivered with equal force on the head of a strong man in the enjoyment of robust health, would not have been attended by any serious consequences; but upon a life impaired as Finck's was, by self-abuse, they may have accelerated his death; and but for the blows the man would not have died—at least not at the time he did. This makes the defendant criminally responsible. Whart. Hom. 241-243.

In the case of *State v. Morea*, 2 Ala. 275, the court says:

"If the death was accelerated by the violence of the prisoner, his guilt is not extenuated, although death might be, and probably would have been, the result of the disease which then afflicted the deceased." See, also, Whart. Amer. Crim. Law, § 941.

The right of the district attorney to file the information, and the sufficiency of it, were passed upon by department 1 of this court when defendant was brought before it on *habeas corpus*. We approve of what was then said, and it is unnecessary to examine here the questions then considered. *Ex parte Moan*, 3 PAC. REP. 644.

The instructions in the case appear to have been given with a good deal of care, and we find nothing in them upon which error can be predicated.

The motion for a new trial was properly denied.

There is nothing in the record demanding a reversal of the judgment, and the same, as well as the orders of the court, are affirmed.

We concur: ROSS, J.; MCKINSTRY, J.; SHARPSTEIN, J.

65 Cal. 544

OHLEYER v. BUNCE. (No. 9,175.)

Filed August 27, 1884.

1. INSOLVENCY — ACT OF 1880 — PRESUMPTION AS TO TIME WHEN DEBTS WERE CREATED.

It will not be presumed that debts were not created until after the act of 1880 went into effect, simply for the purpose of defeating the insolvency proceedings in a collateral attack.

2. SAME—APPOINTMENT OF ASSIGNEE—NOTICE TO CREDITORS—RECITALS IN ORDER.

In an action brought by the assignee of an involuntary insolvent, to set aside a fraudulent sale of his personal property, the fact that notice of the appointment of the assignee was given to creditors is sufficiently established as against the defendant by the recitals in the order appointing him.

3. SAME—FRAUDULENT SALE—NOTICE OF PURCHASER.

A purchaser who buys goods of an insolvent, not in the ordinary course of business, will be chargeable with notice of his insolvency, and that the sale

was made with a view to prevent the property from being distributed among his creditors, within the meaning of section 55 of the insolvent act of 1880.

In bank. Appeal from judgment of superior court of Sutter county.

Craddock & Belcher, for appellant.

Stabler & Boyne, for respondent.

MORRISON, C. J. Plaintiff sues as the assignee of Jonas Marcuse, and alleges in his complaint that on the fourteenth day of January, 1882, certain creditors of Marcuse filed a petition in the superior court of Sutter county, wherein they averred that Marcuse has made a fraudulent sale of a certain stock of merchandise, in contemplation of insolvency, all of said creditors then and there being creditors of Marcuse in the aggregate amount of \$5,025; that on the twenty-sixth day of January, 1882, said Marcuse was by the order of the superior court adjudged an insolvent debtor at the date of said order and at the time of filing the petition; that afterwards, to-wit, on the thirteenth day of March, 1882, the plaintiff, George Ohleyer, was by an order of the court duly appointed assignee of said insolvent debtor; that on the twentieth day of the same month he duly qualified as such assignee, and received in due form of law an assignment of the estate of Marcuse; that on the thirty-first of December, 1881, Jonas Marcuse was insolvent, and in contemplation of insolvency, and within one month prior to the filing of the petition by the creditors of Marcuse, he, the said Marcuse, then and there being insolvent and unable to pay his debts, and in contemplation of insolvency, did make an assignment, transfer, and conveyance to the defendant, Bunce, of the aforesaid stock of goods, wares, and merchandise, with a view to give said defendant a preference, and to pay him before and in preference to all other creditors of him, the said Marcuse, and in particular before and in preference to these petitioning creditors, and also with a view to prevent the assets of the insolvent debtor from coming to the possession of the assignee, and of being ratably distributed among the creditors of said Marcuse, thereby to hinder, impede, and delay, and also to defeat, the object of the act of the legislature of the state of California, entitled "An act for the relief of insolvent debtors," etc., approved April 16, 1880. The complaint contains the further averment that the defendant received and accepted said assignment, transfer, and conveyance with reasonable cause to believe that Jonas Marcuse was insolvent, and that such conveyance was made with a view to prevent the property so conveyed from coming into the hands of the assignee in insolvency, and to prevent the same from being distributed ratably among the creditors of the insolvent debtor, and with the intent to defeat the object—to impede and prevent the due operation—of the aforesaid insolvent act. As will be seen from an examination of the complaint, the action is brought under section 55 of the insolvent act of 1880, by the plaintiff, as assignee of the estate of Jonas Marcuse, an insolvent debtor, to recover from the defendant certain personal prop-

erty, or its value, and to charge the defendant as a fraudulent vendee of an insolvent debtor. Plaintiff had judgment, and defendant appealed therefrom.

The first point made by appellant is that the petition filed by the creditors of Marcuse was substantially defective, inasmuch as it did not show when the debts of the petitioning creditors were created. We are informed by the transcript that the creditors' petition in "involuntary insolvency" was introduced in evidence by the plaintiff, but the contents thereof are not stated. It may have shown that the debts were created after the act of 1880 went into effect, and certainly we will not presume *that it did not*, simply for the purpose of defeating the insolvency proceedings in this collateral attack.

The next point made by the appellant is that the court had no jurisdiction to make the order appointing an assignee, and this is predicated on the assertion that no notice was given to the creditors, as required by law; but this fact is sufficiently established as against the defendant by the recitals in the order appointing the assignee, there being no provision of the insolvent act making the proof of publication a part of the record. *Barrett v. Carney*, 33 Cal. 530; *Langenour v. French*, 34 Cal. 92.

There is another ground on which appellant relies in support of his appeal, and that is that the findings are insufficient to support the judgment. It is claimed that the findings of fact do not bring the sale of Marcuse to the defendant within the provisions of the insolvency law, because it is not found by the court that the sale was made *with a view to give a preference to a creditor or person having a claim against him, the insolvent vendor*. Is such a finding necessary to avoid a transfer to a purchaser for value? The appellant contends that such a sale cannot be avoided by the creditors, unless made under the following conditions: "(1) By a vendor, being insolvent, or in contemplation of insolvency; (2) within a month of the filing of the petition by or against him; (3) with a view to give a preference to a creditor or person having a claim against him; (4) to or for the benefit of a person having reasonable cause to believe that the vendor is insolvent, and that the transfer is made with a view to prevent his property from coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors, or to defeat the object of, or in any way hinder, impede, or delay the operation of, or to evade the provisions of, the insolvent law."

But must all of the foregoing conditions exist, in order to enable the creditors of an insolvent debtor to avoid a sale made by him?

By section 55 of the insolvent act of 1880 it is provided that a sale made by an insolvent debtor may be set aside by the creditors when the same is made with a view to prevent his property from coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors, or to defeat the object of, or in

any way hinder, impede, or delay the operation of, or to evade any of, the provisions of this act."

Finding 11 of the court is in the following language:

"That on December 26, 1881, said Marcuse was insolvent, and in contemplation of insolvency, and, with a view to prevent his property from being distributed ratably among his creditors, he made said sale and transfer of said goods, wares, and merchandise; that said sale and transfer were not made in the usual and ordinary course of business of said Marcuse, and for that reason—there being no evidence sufficient to overcome the legal presumption raised by that fact—the said Bunce had reasonable cause to believe that said Marcuse was insolvent, and that said sale and transfer were made with a view to prevent the said property from being distributed ratably among the creditors of said Marcuse."

We think that the findings of the court were not sufficient to bring the case within the prohibitory provisions of the insolvent act of 1880, and that there was sufficient evidence in the case to support the findings.

Judgment and order affirmed.

We concur: MYRICK, J.; THORNTON, J.

SHARPSTEIN, J. I concur in the judgment; but on the question of the right of the plaintiff to commence and maintain this action, I think that when he introduced an order of the court appointing him assignee, he established, *prima facie*, his right to bring the action, and that it then devolved on the defendant, if he challenged the validity of said appointment, to show that it was invalid. The law requires that a copy of the order declaring a petitioner insolvent, etc., shall immediately be published by the clerk in a newspaper, as often as it is printed, before the meeting of creditors, but it does not provide in what mode the proof that such order of publication has been complied with shall be made. I think we ought to presume in such a case that the court, before making the appointment, was satisfied that due publication had been had, and, as the act is silent as to the mode of proving that fact, the court was authorized to require it to be proved in such manner as it might prescribe, and that it was not necessary that the record should show that such proof had been made. In any event, the publication is required to be made in the interest of creditors, and until one of them complains of a want of sufficient publication, it is unnecessary to decide whether this question could be raised in a collateral proceeding by any one.

McKEE, J. I concur.

65 Cal. 540

PEOPLE v. TURNER. (No. 10,968.)

Filed August 27, 1884.

1. CRIMINAL LAW AND PROCEDURE—ASSAULT TO MURDER—INDICTMENT—FINDING—DEADLY WEAPON.

On an indictment for assault to murder, it is unnecessary to charge in the indictment, or for the jury to find, that the assault was made with a deadly weapon. It is sufficient to charge the offense in the language of the statute; and an offense sufficiently charged is sufficiently found in the language of the charge.

2. SAME—INSTRUCTIONS.

Instructions held properly refused where they had been substantially given already.

Department 1. Appeal from the superior court of Plumas county. *W. W. Kellogg, D. W. Jenks, and J. D. Goodwin*, for appellant. *The Attorney General*, for respondent.

MORRISON, C. J. The defendant was indicted for the crime of assault with intent to commit murder upon one William B. Thomas, and was found guilty of an assault with a deadly weapon. The verdict of the jury is in the following language:

"We, the jury in the case of the People of the State of California against Thomas Alexander Turner, find the defendant guilty of an assault upon the person of William B. Thomas with a deadly weapon."

Upon the foregoing verdict the court entered judgment condemning the defendant to two years' imprisonment in the state prison.

1. The first ground of reversal urged on this appeal is that the judgment is erroneous because the verdict found the defendant guilty of nothing but an assault. It is claimed that there was no finding that the assault was committed with intent to produce great bodily injury, and that therefore the verdict did not find the ultimate and essential facts necessary to support the judgment for a felony under section 245 of the Penal Code—that the *intent* is not found.

The case of *People v. Vanard*, 6 Cal. 562, is relied upon by the defense, but it is claimed on behalf of the prosecution that the law has been changed since that case was decided, and that section 245 of the Penal Code, as it now stands, makes it a felony for one person to assault another with a deadly weapon; and, furthermore, that it is sufficient to charge an offense in the language of the statute, and that an offense sufficiently charged is sufficiently found in the language of the charge. These are elementary principles of law, and need no citation of authorities in support of them. Section 245 of the Penal Code, as it was amended in 1874, is as follows:

"Every person who commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable by imprisonment in the state prison, or in a county jail, not exceeding two years, or by fine not exceeding five thousand dollars, or by both."

It is conceded by the prosecution that, under the statute as it stood before the amendment, it was necessary to charge (and find) that the assault was made with a deadly weapon; and it is claimed by the defense that the law has undergone no change in this regard by the amendment of 1874. We think that the amendment has worked a material change in the section, and that, as it now stands, it is unnecessary to charge in the indictment, or for the jury to find, that the assault was made with a deadly weapon. It is sufficient to follow the language of the statute in charging the offense, and, by parity of reasoning, it is sufficient for the jury to find in the language of the charge.

We therefore conclude that the point is not well taken. See *Ex parte Donahue*, ante, 449.

2. The second ground of error assigned on the appeal is "that the court erred in allowing the prosecution to ask an impeaching witness the question below stated, for the reason that the proper foundation had not been laid." Paul Lenneux was being examined as a witness on behalf of the defense, and on cross-examination was asked the following question: "Did you not state in the month of September, in the presence of William Knowles and James Robinson, on the way between town here and the race-track, that you would go into court and swear anything at all that would injure the Thomases?" The answer was, "No, sir." For the purpose of contradicting or impeaching the witness, the prosecution afterwards called William Knowles, and interrogated him on the subject of the supposed conversation. He was asked: "Did you have a conversation with Paul Lenneux during the fair week, on the road between Quincy and the fair-grounds, in the presence of James Robinson and others?" *Answer*. "The conversation was directed to James Robinson. I heard it." *Question*. "What was the conversation?" To the question the defendant objected, upon the ground that no proper foundation had been laid. The objection was overruled, and exception noted. *A*. "He said he would do anything to injure the Thomases, or do anything he could to help Turner." The objection that a proper foundation had not been laid for asking the question put to the impeaching witness can only mean that the question put to the witness whom it was sought to impeach was not sufficiently definite. We think it was, and as that is the sole ground of the objection it was not error to overrule it.

3. The third point is on the refusal of the court to give the jury the following instruction:

"You are instructed that, before you can find the defendant guilty, you must be satisfied, to a moral certainty, that the circumstances of the case are not only consistent with the guilt of the defendant, but are entirely inconsistent with any other reasonable hypothesis that can be adduced from the evidence."

The instruction was refused on the ground that it had already been substantially given. The court fully and correctly charged the jury

on the subject of reasonable doubt, and, in our view of the case, the charge sufficiently covers it. There is no doubt that, in a proper case, dependent upon circumstantial evidence, such an instruction as that asked by the defendant should be given by the court, but the present case did not depend in any degree on circumstantial evidence. That the defendant shot Thomas was an uncontroverted fact in the case. It was proved by the evidence of Thomas and several other witnesses, and was admitted by the defendant when he took the stand as a witness. The only matter of defense was that the shooting was in self-defense. The question and the law of justification or excuse was fully and correctly stated by the court to the jury, and the only principles of law applicable to the facts of the case, as they were proved on the trial, were given to the jury.

Having examined all the points made in defendant's brief, and finding nothing in them to warrant a reversal of the judgment, the same, and the order denying a new trial, are affirmed.

We concur: SHARPSTEIN, J.; ROSS, J.; MCKINSTRY, J.

65 Cal. 538

PEOPLE v. WASSON. (No. 10,972.)

Filed August 27, 1884.

1. CRIMINAL LAW AND PROCEDURE—DYING DECLARATIONS.

The expression of an opinion by decedent that he thought defendant was the man who shot him, is not admissible as a dying declaration.

2. SAME—RES GESTÆ.

Statements of deceased, made some days after the shooting, are not admissible in evidence as part of the *res gestæ*.

3. SAME—CROSS-EXAMINATION OF WITNESS TO SHOW PREJUDICE.

It is always competent, on cross-examination, for the party against whom a witness is called and testifies, to show that such witness entertains feelings of hostility and prejudice towards him.

Department 1. Appeal from judgment and order of superior court of Tehama county, refusing a new trial.

Hitchcock & Kelly, for appellant.

The Attorney General, for respondent.

MORRISON, C. J. The defendant was charged in the information with the crime of murder, and the verdict of the jury was in the following form: "We, the jury, find the defendant guilty as charged in the information, and fix the penalty at imprisonment for life." The information charged the defendant with murder, which includes three degrees of felonious homicide, to-wit, murder in the first degree, murder in the second degree, and manslaughter; and the verdict of the jury does not designate which of these three degrees they found the defendant guilty of. By section 1157 of the Penal Code, it is pro-

vided that "whenever a crime is distinguishable into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty." It is unnecessary to decide whether the verdict is or is not sufficient. We are not required to pass upon the point, as there are other errors involved which require a reversal of the case.

2. The next error complained of was the admission by the court, against defendant's objection, of the dying declaration of the deceased. It is very clear that the declaration of Shannon was not competent evidence against the defendant. It was simply the expression of an opinion that the defendant shot him. The language is: "I think that this man, Henry Wasson, (the defendant,) is the man that shot me." If the party making the dying declaration admitted in evidence against the defendant in this case had been on the stand and examined as a witness, he would not have been allowed to testify to his opinion. He did not see the defendant fire the shot, and did not pretend to *know* who it was that shot him. It was, at most, but an expression of an opinion on the subject, and his *opinion* was not competent evidence in the case. In the case of *People v. Taylor*, 59 Cal. 645, this court says: "The law is well settled that the declarations of the deceased are admissible only to those things to which he would have been competent to testify if sworn as a witness in the cause. They must relate to facts only, and not to mere opinion."

3. The statements of Shannon, made some days after the shooting, were not admissible in evidence. They did not come within the rule admitting statements which are a part of the *res gestæ*, for they were simply a narrative of a past transaction, and were wholly incompetent. 1 Greenl. Ev. §§ 469, 108, 113; *People v. Doyell*, 48 Cal. 85.

4. The only other question in the case which we deem it necessary to notice in this opinion is the following: One Thomas Carroll was called as a witness for the prosecution, and, after testifying to matters material to the issue, was asked the following question on behalf of the defense: "I will ask you now, Mr. Carroll, if on Saturday evening, in Pike Payne's saloon, in the town of Red Bluff, in the presence of Mr. McGowan and Mr. Thatch, both witnesses in this case, you did not make the remark that Wasson (the defendant) ought to have been hung before he left Butte Creek." The foregoing question was objected to by the prosecution as "irrelevant and immaterial." The objection was sustained, and exception duly taken by the defendant. It was a proper question, and should have been allowed. It is always competent for the party against whom a witness is called and testifies to show that such witness entertains feelings of hostility and prejudice towards him, and such was the object and tendency of the inquiry above referred to. In the case of *People v. Benson*, 52 Cal. 380, the court say:

"It is difficult to see on what ground this evidence was excluded, as it is perfectly well settled that on cross-examination a witness may be interrogated as to any circumstance which tends to impeach his credibility by showing that

he is biased against the party conducting the cross-examination, or that he has an interest in the result adverse to such party. No citation of authorities is needed on a point so well settled, and the ruling was obviously erroneous."

It may be remarked, in closing this opinion, that the attorney general confessed error on the argument of this appeal.

Judgment and order reversed, and cause remanded for a new trial.

We concur: SHARPSTEIN, J.; MCKINSTRY, J.; ROSS, J.

65 Cal. 548

HEATH and another v. SCOTT. (No. 8,472.)

Filed August 28, 1884.

1. PRACTICE—REVIEW ON APPEAL—CONCLUSIONS OF JURY.

Conclusions reached as to the weight of the testimony of each witness, and inferences drawn by the jury from the facts proved by their testimony, and from the conduct of the parties, are not reviewable on appeal. An appellate court does not go behind conclusions and inferences drawn by a jury for the purpose of examining conflicting testimony and determining its sufficiency or insufficiency to justify a special or general verdict.

2. WITNESS—IMPEACHMENT—REPUTATION.

In any civil or criminal action or proceeding a witness may be discredited or impeached, and for such purpose his general character for truth, honesty, and integrity may be inquired into.

3. SAME—RESIDENCE OF IMPEACHING WITNESS.

A witness called for the purpose of impeaching the character of another witness should come from or be a resident of the neighborhood where the person whose character is called in question resides. If, during such residence, he acquires knowledge of the witness' character, he is qualified to speak, no matter what the quality or quantity of such knowledge may be, and it is for the jury to determine the value of his testimony.

4. PRACTICE—GOING TO TRIAL WITHOUT DEPOSITIONS—SURPRISE—USING DEPOSITIONS.

Going to a trial in a case without depositions which have been taken in it, constitutes no legal surprise; for, if the depositions have not been transmitted to the court before trial, either party may, if he wants to use them, move for a continuance until they come to hand; or, if they have been transmitted, and the party by whom they were taken does not offer them in evidence, the adverse party may offer them, or any part of them, in evidence.

5. SAME—SETTING ASIDE VERDICT.

If a party claiming surprise do not then and there apply for any rener to which he may be entitled, he will not be allowed to claim the surprise as a ground for setting aside the verdict against him.

Department 1. Appeal from the superior court of San Joaquin county.

J. B. Hall, for appellant.

Terry & McKinne, for respondent.

MCKEE, J. This was an action to recover money obtained upon a promissory note given by the defendant on the ninth of October, 1867, payable on demand to the order of the plaintiffs, in the sum of \$1,000, with interest at the rate of 2 per cent. per month until paid. The action was commenced on the twenty-third of March, 1880, 13 years after maturity of the note; but, soon after giving the note, the

defendant, upon his own petition, was declared a bankrupt by the United States district court for the state of California; and on the twenty-third of October, 1880, by the judgment of said court, he was discharged from all his debts, except such as were created by fraud. And the charge is that the debt for which this note was given, and which was provable, and in fact was proved, filed, and registered in the bankruptcy court as a debt against the estate of the bankrupt, was created by the fraud of the defendant.

Assuming that the complaint contained a sufficient statement of a cause of action, the defendant answered it, and, by his answer, specifically denied the charges of fraud made against him. There was therefore but one issue in the case: Was the defendant guilty of fraud in creating the debt for which the promissory note to the plaintiffs was given? If he was not, the action could not be maintained, for the plaintiffs in their complaint alleged and admitted the discharge. Upon the issue questions were framed and submitted to a jury, answers to which were returned and filed as a special verdict, and a general verdict was also rendered for the defendant. Being dissatisfied with the verdicts, plaintiffs moved for a new trial upon the grounds of insufficiency of the evidence to justify the verdicts, and that they were against law, and on the grounds of surprise and of errors of law in the rulings of the court at the trial. Both verdicts were rendered upon substantially conflicting testimony as to the nature of the transaction, and the conduct of parties to the transaction by which the debt in controversy was created. Of the credibility of the witnesses who testified, and the weight to be given to the testimony of each of them, the jury were the exclusive judges. Conclusions reached as to the weight of the testimony of each witness, and inferences drawn by the jury from the facts proved by their testimony, and from the conduct of the parties, are not reviewable on appeal. An appellate court does not go behind conclusions and inferences drawn by a jury for the purpose of examining conflicting testimony, and determining its sufficiency or insufficiency, to justify a special or general verdict. The presumption is that the evidence was sufficient, and, being sufficient, we must accept the verdict as conclusive of the facts covered by it; and, if the conclusion of law be logically drawn from the facts, the decision is not contrary to law; therefore a new trial cannot be granted except for prejudicial errors occurring at the trial, or for surprise which ordinary prudence could not have guarded against, or for some other of the causes specified in section 657, Code Civil Proc.

It is urged that the court erred in its rulings at the trial upon an inquiry as to the general character of a witness for the plaintiffs. In the course of the trial it was proved that the debt in controversy was created to secure a loan of \$1,000, which defendant obtained from the plaintiffs by certain representations, which, it was charged, were falsely and fraudulently made. One was that Jacob Morss, a re-

sponsible party, had promised to sign the promissory note to the plaintiffs to secure the loan, as a co-maker and surety with the defendant. Whether Morss made such a promise to the defendant, therefore, became a material question on the trial of the case. Upon that question the deposition of Morss was read in evidence, and it tended to prove that no such promise had been made. Four or five witnesses, however, gave evidence tending to prove statements by Morss directly contradictory to his testimony, and, for the purpose of further discrediting him, a witness was asked this question: "Do you know the general reputation of Morss for truth and integrity in the community in which he resides?" To the question plaintiffs objected: (1) That the witness did not come from nor reside in the neighborhood in which Morss lived; (2) that the question should be limited to general reputation for truth and veracity. Both objections were overruled, against plaintiff's exceptions.

Whether an inquiry as to the general character of a witness should be restricted to reputation for truth and veracity is not now an open question. In *People v. Yslas*, 27 Cal. 630, it was held that the inquiry should not be extended beyond those limits. That case was decided under a rule of law which was at the time regarded as too well settled to be disturbed. But after that decision the legislature enacted as follows: "In any civil or criminal action or proceeding a witness may be discredited or impeached, and for such purpose his general character for truth, honesty, and integrity may be inquired into." St. 1877-78, p. 193. The rule thus enlarged was embodied in the Code of Civil Procedure, §§ 1847, 2051. And it was at the time of the trial, and is now, the law of the subject of inquiry into the general character of a witness for the purpose of impeachment. There was therefore no error in overruling that objection.

As to the other objection, it may be conceded that a witness called to testify in such an inquiry ought, ordinarily, to come from the neighborhood of the person whose character is called in question. Morss lived in San Luis Obispo county for 12 consecutive years before his deposition was taken, and in San Joaquin county before he moved to San Luis Obispo county; and the witness resided in San Joaquin during Morss' residence there, and also for five months in San Luis Obispo, in the neighborhood of Morss. Five months' residence in the neighborhood of a person may be sufficient for acquiring a knowledge of the general character of the person. And if, during such residence, a witness does acquire, from the reports of the character of the person which prevail in the neighborhood, any knowledge whatever, he is qualified to testify. The quality or quantity of such knowledge is not a matter for the court. If the witness has any knowledge at all, he is entitled to speak, and it is for the jury to determine the value of his testimony.

But plaintiffs claim to have been surprised by the attack upon the character of their witness, because they say that, after the attorneys

of defendant had notified and stipulated with them for taking depositions and counter-depositions of witnesses in San Luis Obispo county, to be read as evidence upon the subject of inquiry as to the character of Morss, they went to trial without the depositions, and resorted to other testimony for the purpose of impeachment. Going to trial in a case without depositions which have been taken in it, constitutes no legal surprise; for, if the depositions have not been transmitted to the court before trial, either party may, if he wants to use them, move for a continuance until they come to hand; or, if they have been transmitted, and the party by whom they were taken does not offer them in evidence, the adverse party may offer them, or any part of them, in evidence. Code Civil Proc. § 2034. A party taking depositions is not bound to offer them in evidence. He may resort to other testimony; and if he does take that course, and the adverse party is surprised by it, the latter must then and there apply for any relief to which he may be entitled under the conditions in which he finds himself. If he does not apply, he will not be entitled to claim the surprise as a ground for setting aside a verdict against him. It is well settled that if a party claiming to be surprised by the introduction of testimony fails to apply at the time for a continuance of the cause, or to resort to other testimony, or to ask for any relief to which he might be entitled under the circumstances, his failure is attributable to his own fault, and constitutes no ground of surprise upon which a new trial will be granted. *Schellhous v. Ball*, 29 Cal. 608; *Turner v. Morrison*, 11 Cal. 21; *Delmas v. Martin*, 39 Cal. 555, as modified by *Ferrer v. Mutual Ins. Co.* 47 Cal. 416.

There was no error in refusing to give instructions asked by the plaintiffs upon questions which were substantially covered by instructions which the court had previously given to the jury.

Judgment and order affirmed.

ROSS, J. Whatever cause of action, if any, there is set out in the complaint is founded on the alleged fact that the money for which the note was given was obtained by defendant from the plaintiffs by means of false representations, and upon this question the finding of the jury, upon evidence substantially conflicting, was against the plaintiffs. The objections to the question put to the witness Leets were properly overruled. Conceding that, ordinarily, a witness must himself have been a resident of the same neighborhood with the person concerning whose reputation he is asked, such requirement was answered in the case of the witness Leets. Upon the other objection I agree with what is said by Mr. Justice McKEE, and I also agree with him in what is said upon the question of the alleged surprise.

McKINSTRY, J. I concur in the conclusions announced by Justices McKEE, and ROSS and in the judgment. I add that, in my opinion, the complaint does not contain a statement of a cause of action.

SUPREME COURT OF CALIFORNIA.

(65 Cal. 517)

In re Estate of BRENNAN, Dec'd. (No. 9,445.)

Filed August 26, 1884.

PRACTICE — ADMINISTRATRIX SUBSTITUTED AS PARTY — PRESENTATION OF JUDGMENT.

Where an administratrix is substituted for her testator as party to an action, and judgment is then rendered against the estate, no presentation of the same to the executrix is required under section 1505, Code Civil Proc.

Department 2. Appeal from the superior court of San Joaquin county.

Byers & Elliot, for appellant.

Louittit & Lindley, for respondent.

THORNTON, J. The judgment rendered at the instance of the moving party, the executrix of D. Brennan, deceased, was, in legal effect, a judgment against her. She had then been made a party. Her testator had then died. No valid judgment could have been entered against the testator after his death. The new judgment was one against the executrix, to be paid in due course of administration. It makes no difference that the judgment was not formally entered. The court can order it to be entered properly *nunc pro tunc*, there being enough in the record to amend by. In this view the filing of the certified copy of the original docket of the judgment among the papers of the estate of D. Brennan, deceased, in court was sufficient. Code Civil Proc. § 1504. This document was filed in the case as required by law. But conceding that the modified judgment was one against the testator, and that the order merely amounted to a reduction of the judgment against the testator, the executrix then having been made a party to the cause, on the pendency of the motion for a new trial, the judgment was really presented to her. She appeared on the motion for a new trial, and succeeded in procuring a modification of the judgment, and a reduction of it by \$547.59. She was a party to the action, and took part in the litigation. The testator had fully defended the action, judgment had passed against him, he served notice of intention to move for a new trial, and then died. Before the hearing of this motion his executrix had been made a party to the action, and she prosecuted the motion with the result above stated. The judgment was one which could only have been paid in due course of administration. No execution could have issued on it. No payment of it is pretended. We do not see, under these circumstances, that any presentation of the judgment was required under section 1505, Code Civil Proc.

Judgment and order affirmed.

We concur: MYRICK, J.; SHARPSTEIN, J.

v.4,no.14—36

65 Cal. 555

Du PRAT, Ex'x, v. JAMES and others. (No. 9,483.)

Filed August 28, 1884.

1. MINERAL LANDS—INTRUSION.

An entry cannot be made upon the actual possession of another for the purpose of laying foundation for a pre-emption claim to public lands of the United States.

2. SAME—LOCATION OF MINE—LABOR.

Performance of the specified amount of labor annually, on a mining claim, is a condition which must be complied with, and a failure on the part of a locator to perform such work will forfeit his right to hold such claim.

3. SAME—LABOR BEFORE RELOCATION.

The original locator of a mining claim has a right to perform the labor after the failure, and still have the benefit of his location, if the labor is done before relocation.

4. SAME—TRAVELING EXPENSES.

Expenditure of money and time in traveling about regarding matters connected with a mining claim, are in no sense labor performed on the mine.

5. SAME—EVIDENCE OF LOCATION.

Prominent and permanent monuments, and stakes at the corners, properly posting notices, and distinctly marking the location on the ground, sufficiently establish the location and boundaries of a mining claim.

Department 2. Appeal from the superior court of Tuolumne county.

Taylor & Haight, for appellant.

Street & Street, for respondent.

MYRICK, J. This is an action to recover possession of a mining claim in Tuolumne county. The action was commenced in April, 1881, by J. J. Du Prat as plaintiff. He having died after the judgment in the court below, his executrix was substituted. For convenience, the deceased is herein spoken of as plaintiff. The judgment was in favor of defendants.

On this appeal, on behalf of plaintiff, points are made as follows:

First. Defendants having entered on an actual possession of plaintiff, their entry can give them no right as against him. The facts in this regard, as found by the court, are substantially as follows:

The plaintiff and his predecessors in interest had, from 1863 down, worked the mine, and had expended, in sinking shafts and mining tunnels, over \$9,000, and were in the possession of the mine from its location down to the time of the entry of defendants. In the years 1875, 1876, 1877, 1878, and 1879 plaintiff caused the requisite amount of labor, under the act of congress, (Rev. St. U.S. § 2324,) to be performed; but in the year 1880 plaintiff caused but nine dollars' worth of work to be performed on the claim. On the first day of January, 1881, the defendants James and McCartea entered peaceably and in good faith upon the premises in controversy, for the purpose of locating a mining claim, and located a portion of said premises by posting notices and erecting monuments, which location was distinctly marked on the ground, so that its boundaries could be readily traced. On the fifth day of January, 1881, the written notices of location having been defaced by rains, the defendants James and McCartea renewed the notices, and reset the stakes at the corners, and built stone mounds around the same at the corners thereof.

On said first day of January said defendants above named went into possession of the claim located by them, and have ever since so remained, and have been continuously at work thereon, and expended about \$1,000 in each of the years 1881 and 1882. On the fifth of January, 1881, the defendants Ellis and Sutton entered peaceably and in good faith upon the mine in question for the purpose of locating a mining claim, and located a claim embracing a portion of the premises in controversy, and posted notices and drove stakes and erected monuments, and distinctly marked the location on the ground, so that its boundaries could be readily traced. On the same day said defendants went into possession of the ground claimed by them, and were in the actual and exclusive possession thereof during the years 1881 and 1882, and performed labor in and upon their said claim in 1881 to the value of \$300; in the year 1882 they performed the amount of labor thereon required by the act of congress of May 10, 1872.

It has been held by the supreme court of the United States, and by this court, that a person cannot enter upon the actual possession of another for the purpose of laying foundation for a pre-emption claim to public lands of the United States; and it is claimed by the appellant that the same principle operated upon the parties to this controversy, and the defendants could not lawfully enter upon the possession of the plaintiff and make a valid location, nor acquire any right as against the plaintiff; that the defendants could not, by a trespass, lay a foundation for obtaining the benefit of the act of congress for the location of mining claims. The cases of *Eilers v. Boatman*, (supreme court of Utah,) 2 PAC. REP. 66, and *Weise v. Barker*, (supreme court of Colorado,) Id. 919, are cited to support this view; but we think a close examination of the act of congress (Rev. St. U. S. §§ 2322, 2324) shows the reverse to be the better view. After declaring, in section 2322, that the locators of all mining locations, *so long as they comply with the laws of the United States*, and with the state, territorial, and local regulations not in conflict therewith, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, etc., and after declaring, in section 2324, that a certain amount of labor shall be performed in each year, it is provided in section 2324 that, "upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made."

It seems from the foregoing that plaintiff's only right to the possession depended upon the performance, annually, of the specified labor; and, the labor being unperformed, the ground was open to relocation. The act of congress does not say the ground shall be open to relocation if the labor be unperformed *and* if it be unoccupied; on the contrary, as above said, it is open to relocation if the labor be unperformed.

It is urged that the clause of section 2324, giving to the original locator the right to perform the labor after the failure and before the relocation, gave him the right (as against the relocater) to remain in possession and exclude all others. The logical result of that propo-

sition would be to annul the requirement for the performance of the labor, for if he may remain and prevent relocation for one day, he may for a year, he may for an indefinite period. Congress had the power to impose such conditions on the right to the possession of the public lands as it saw fit; and we think such conditions must be complied with. It will be observed that the entry of the defendant was peaceable and in good faith. The right of the original locator to perform the labor after a failure, and have the benefit of his location, is dependent upon his having performed the labor *before* the relocation.

Second. Plaintiff insists that he performed the work required, and therefore did not forfeit his right to hold the ground. The court found that he performed in the year 1880 three days' labor, of the value of three dollars per day, and no more. The plaintiff claims that the court erred in excluding from its conclusion as to labor performed on the claim his time and expenses spent and incurred as follows: In October, 1879, plaintiff leased a mill located about a quarter of a mile from his claim, and from that time until December 25th made unsuccessful efforts to obtain water to operate the mill. About the latter part of December, 1879, or the first of January, 1880, the company owning a ditch let sufficient water run to the mill for the use of plaintiff, but he did not use or attempt to use the same, nor crush or attempt to crush rock or ore. Plaintiff went from Groveland to Sonora, in said county, twice, from Groveland to San Francisco once, and from Oakland to San Francisco five or six times to see the agent of the water company for the purpose of getting water to operate the mill. His personal expenses incurred, and the value of his time on those occasions, were from one hundred and fifty to four hundred dollars. We think that in no sense can these expenditures and values be said to be labor performed on the mine.

Third. Plaintiff asserts that the locations of the defendants were invalid. The court found that notices were posted by the defendants on their respective locations, (copies of the notices are given in the findings,) and that stakes were driven firmly in the ground at the corners, and stone monuments placed around the same, and that the stakes were marked as corner stakes. The court also found that the defendants distinctly marked the locations on the ground, so that the boundaries could be readily traced, and that the stakes placed at each of the four corners were firmly planted in the ground, and that the stakes and stone mounds built around the same were prominent and permanent monuments by which, and the descriptions in the notices, the claims could be identified. Plaintiff urges that the corners only were established, and that no side or end lines were in any way laid down. The provision of the statute being that the "location must be distinctly marked on the ground so that its boundaries can be readily traced," (there being no specific direction as to how the marking is to be done,) and the court having found that the stakes and mounds at the corners were prominent and permanent monuments by which,

and the descriptions in the notices, the claims could be identified, and also having found that the locations were distinctly marked on the ground, so that the boundaries could be readily traced, we do not see any failure on the part of defendants to comply with the requirements of the statute. Whether or not, from the objects placed by the defendants, the boundaries could be readily traced, was a question of fact for the court below.

The *fourth* point relates to alleged variations in the descriptions of the ground located as between the answer and the testimony. We do not see any substantial variation. Whatever appears is more apparent than real.

Judgment and order affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

2 Cal. Unrep. 360

WEST v. GIRARD. (No. 8,277.)

Filed August 23, 1884.

1. PRACTICE—VERDICT—ISSUES.

Where material issues in a case are not disposed of by the verdict of a jury, or the findings of a court, there must be a new trial.

2. SERVITUDES—SURFACE WATER—CONTIGUOUS TRACTS OF LAND.

When coterminous tracts of land are in such a position that the lower tract owes a servitude to the other to receive surface water, it cannot be forced back upon the dominant tract by any act of the servient owner.

Department 1. Appeal from the superior court of San Joaquin county.

F. T. Baldwin and *J. C. Campbell*, for appellant.

Byers & Elliot, for respondent.

MCKEE, J. Two material issues were submitted to a jury in this case, namely: "(1) Is there, through the land of plaintiff, a natural water-course which leaves the land of plaintiff on the south, and which passes through into the land of defendant? (2) Has defendant caused said natural water-course to be obstructed by an embankment along the south line of plaintiff's land?" On both issues the jury failed to agree upon a verdict, and the court did not find upon either of them. Where material issues in a case are not disposed of by the verdict of a jury or the findings of a court, there must be a new trial.

But it is urged that the issues were immaterial, because, besides the averments in the complaint which were traversed by the answer of the defendant, and raised the issues which were not disposed of, it was also averred that the land of the plaintiff "slopes south towards the land of defendant, and the water which passes through the said water-course, and the surface water which falls upon and passes over

plaintiff's land, flows upon the land of defendant when allowed to pursue its natural course." The action was for the abatement of a private nuisance caused, as alleged, by the filling up of a natural water-course, and by the obstruction, by an embankment therein, of the natural flow of the water, so as to turn it back upon the plaintiff's land to his damage. It was not an action, as in *Ogburn v. Connor*, 46 Cal. 346, to prevent the obstruction of the natural flow of surface water from the land above upon an adjacent lower tract. In that case "there was no stream or water-course upon the plaintiff's land." In this, it is alleged, there was "a natural water-course," and that by its obstruction the injury complained of was caused. If such a water-course existed as alleged, then, as to it, the plaintiff and defendant were riparian proprietors, and it would not be lawful for either of them to do any act which would interfere with the rights of the other therein. A water-course constitutes part of the soil through which it extends, and when used for any beneficial purpose in connection with proprietary rights, it cannot be filled up or obstructed by any proprietor to the injury of another. If, therefore, the surface water falling upon the plaintiff's land, "when allowed to pursue its natural course," flows into and through a natural water-course from the plaintiff's land upon the land of the defendant, the latter has no right to fill up the water-course, or to build in it an embankment, or other barrier, on his own land, to obstruct the natural flow of the surface water, or of the water of the stream, and force it back upon the plaintiff's land. When coterminous tracts of land are in that position, the lower tract owes a servitude to receive the surface water from the upper tract, especially if the water turns into a water-course extending through both tracts, or onto the lower tract; and the right of the owner of the dominant tract to have the water reach the water-course, either on his own land or upon the land of the servient owner, cannot be interfered with. The water cannot be forced back upon the dominant tract by any act of the servient owner. The owner of the dominant tract has a right to its natural flow into the water-course. But to support a judgment for the violation of such a right, the existence of the water-course and its obstruction, if questions at issue, must be admitted or proved, and found by the verdict of the jury or the finding of the court. The allegations, finding, and judgment must correspond.

Judgment and order reversed, and cause remanded for a new trial.

We concur in the judgment upon the ground that all of the material issues of fact were not determined in the court below: Ross, J.; McKINSTRY, J.

(65 Cal. 559)

CRITES v. MULLER. (No. 9,331.)

Filed August 28, 1884.

PARTNERSHIP—PURCHASE FROM PARTNER—GOOD FAITH—REMEDY.

A purchase of partnership property from a member of a firm, in good faith, will be protected, though such partner acted in bad faith, and will not make other partner a tenant in common with the purchaser. The remedy of the defrauded partner is by action against his copartner.

Department 2. Appeal from the superior court of Kern county.

Peck & Mahoon and S. Sobon Hall, for appellant.

Rufus E. Arrick, for respondent.

MYRICK, J. The complaint avers a copartnership between plaintiff and defendant Wilkinson, for the purpose of dealing in cattle, and the ownership by them of 65 head of cattle. It is also averred that the defendants, Wilkinson and Muller, entered into a conspiracy for the purpose of depriving plaintiff of his interest in the copartnership property; that Wilkinson made a pretended sale of the said property to Muller; and that the defendants are fraudulently conspiring against plaintiff and endeavoring to prevent him from having access to the property, and to deprive him of his interest therein. The court found that 46 head of cattle belonged to the copartnership, and that Wilkinson made a pretended sale of the entire band and of the brand to Muller; that such sale only transferred to Muller the interest of Wilkinson in the property, although Muller believed that Wilkinson had the right to sell the whole; and that since the sale the plaintiff and Muller are equally interested in the property. As conclusions of law, the court found that the sale dissolved the partnership, and that plaintiff and Muller are equally interested in the property as tenants in common, and thereupon, on the twelfth of July, 1883, judgment was rendered in favor of defendants for costs. Subsequently, on the tenth of November, 1883, and without other proceedings, the court caused another judgment to be entered, by which it was adjudged that plaintiff and defendant Muller were equally interested in the 46 head of cattle, as tenants in common, and that the defendants recover costs. This last judgment is appealed from.

Without passing on the right of the court to enter the second judgment, the first not being set aside or reversed, we are of opinion that the second judgment is erroneous. The court found that while Wilkinson acted in bad faith in selling, Muller acted in good faith in purchasing; that is, he believed Wilkinson had the right to sell. The partnership was formed for the purpose of dealing in cattle; either partner was the agent of the firm, (section 2429, Civil Code,) and might sell the whole, (section 2430, subd. 3, Civil Code,) the property being merchandise. If Wilkinson acted in bad faith, plaintiff had his remedy against him; but the purchaser would be pro-

tected. Upon the facts as found, the court was in error in adjudging that Crites and Muller were equally interested in the property.

The judgment appealed from is reversed, and the court below instructed to render judgment for defendants on the findings.

WE CONCUR: THORNTON, J.; SHARPSTEIN, J.

(65 Cal. 558)

PEOPLE v. S. P. R. Co. (No. 9,430.)

Filed August 28, 1884.

REMOVAL OF CAUSE TO UNITED STATES COURT—APPROVAL OF BOND—ACTION TO RECOVER TAXES FROM CORPORATION.

In a suit by the state in one of its courts to recover taxes levied and assessed under its laws against a corporation created by the laws of the state, the lower court properly refused to approve the bond given with a petition for the removal of the action to the federal courts.

Department 2. Appeal from the superior court of Los Angeles county.

Glassell, Smith & Patton, for appellant.

Smith, Brown & Hutton, for respondent.

THORNTON, J. This action was brought in the superior court of Los Angeles county by the people of the state of California against the railroad company above named to recover state and county taxes levied and assessed for the fiscal year 1880–81, etc. The defendant filed its answer and a petition and bond to have the case removed for trial to the circuit court of the United States for the Ninth circuit. The bond was in form in accordance with law. The petition made the answer a part of it. The answer set forth many defenses under the state law, and also defenses under the fourteenth amendment of the federal constitution. The court below refused to approve the bond, proceeded to try the cause, and rendered judgment for the plaintiff.

The question is here presented whether the federal constitution and the act of congress authorize a removal of an action from a state to a federal court brought by the state to recover taxes levied under its laws on the property of a being created by its power in one of its own courts. The removal of the cause, if authorized by the constitution and laws of the United States, involves the trial of every question which may arise in it, whether involving questions of state or federal law. We nowhere find a provision in the acts of congress that should the federal court decide that the federal questions are not maintainable, that the case is to be remanded to the state court, that the questions of state law may there be decided, but the federal tribunals retain the case and proceed to pass on every question, whether arising on the enactments of the state legislature or the federal constitution

and acts of congress. We do not feel authorized to hold that the court below, in not approving the bond offered by defendant, and in going on with the case, erred, in a suit like this by the state in one of its courts to recover taxes levied and assessed under its laws, until it has been held by the highest judicial tribunal of the United States that the removal of such a suit is authorized under the constitution and laws of the United States.

Judgment affirmed.

We concur: SHARPSTEIN, J.; MYRICK, J.

(65 Cal. 561)

BOGGS v. PLACER Co. (No. 9,250.)

Filed August 29, 1884.

TAXATION—TAX COLLECTOR'S FEES.

A tax collector is not entitled to collect fees for the collection of a portion of the tax on certain property, nor until the whole of such tax is collected.

In bank. Appeal from the superior court of Placer county.

J. M. Fulweiler and *Hart & White*, for appellants.

J. E. Prewett, for respondent.

BY THE COURT. The plaintiff, not having collected the taxes in question, is not entitled to commissions or fees for their collection. Not having been prevented from collecting them by the act of the defendant, plaintiff is not entitled to recover of defendant any sum as money had and received to and for his use and benefit.

Judgment affirmed.

THORNTON, J. The tax collector of Placer county was not authorized by law to receive less than the whole amount of taxes (state and county) levied and assessed on one piece of property. The taxes claimed to have been collected in this case were those levied and assessed for county purposes only. The state taxes were not collected. The plaintiff did not, then, collect the whole amount of taxes levied and assessed on one piece of property. Conceding that it must be regarded that plaintiff, as tax collector, did collect the amounts claimed to have been paid, he did not comply with the law in making such collection. Not having complied with the law, I cannot see what title he has to any commissions.

I think the judgment should be affirmed.

MYRICK, J. I do not concur.

2 Cal. Unrep. 363

SEDGWICK, Ex'x, etc., v. SEDGWICK. (No. 8,697.)

Filed August 29, 1884.

ESTATES OF DECEDENTS—EXECUTION SALE—PURCHASE BY TRUSTEE—DAMAGES.

The executor of an estate has no authority to bid for or purchase for the estate, at an execution sale, property sold to satisfy an execution on a judgment in favor of the estate, and, such sale being void, gives no cause of action against the estate for damages by reason of such sale.

Department 1. Appeal from the superior court of San Joaquin county.

J. B. Hall, for appellant.

Byers & Elliot, for respondent.

BY THE COURT. The executor or administrator of an estate of a deceased person has no authority to bid in for the estate, at execution sale, real or personal property levied upon to satisfy an execution issued upon a judgment in favor of the estate. The execution sale of the real estate of the defendant to the plaintiff, as executrix of the estate of Thomas Sedgwick, was therefore void. And as it did not, in law or fact, disturb the defendant in the possession of his land, and the executrix paid no money upon the sale, the defendant had no cause of action against the estate to recover damages resulting from the sale.

Judgment affirmed.

65 Cal. 564

PEOPLE v. BIGGINS. (No. 10,859.)

Filed September 1, 1884.

1. CRIMINAL LAW—MURDER—INSTRUCTION—INSULT.

In a prosecution for murder, an instruction that "insulting words, gestures, or actions will not reduce an unlawful killing from murder to manslaughter, unless the gestures or actions are such as to reasonably induce the belief of danger to life, or of great bodily harm, in the mind of the party against whom they are used," is erroneous if there was evidence before them upon which they might have based a verdict. Where the person against whom actions "are used" has reason to believe that he is in danger of losing his life, or of receiving great bodily harm, the killing of his assailant is justifiable, and such killing is not "unlawful."

2. SAME—DEMURRER—ALLOWING PROSECUTION TO CONFESS.

In a criminal prosecution, an order allowing the prosecution to confess the demurrer to the information, and ordering a new information to be filed, is, within the meaning of section 1007 of the Penal Code, an order to the effect that the demurrer be allowed.

3. SAME—INFORMATION—DESIGNATION OF DISTRICT ATTORNEY—OMITTING NAME OF COUNTY.

Where the information designates by what district attorney it is filed, the omission in the title of the action of the name of the county is not a fatal error, as it does not affect the substantial rights of defendant.

4. SAME—STATUTORY FORM.

An information concluding in the form and language provided by the statute is sufficient.

In bank. Appeal from the superior court of Fresno county.

W. D. Tupper, for appellant.

Atty. Gen. Marshall, for respondent.

BY THE COURT. The court below charged the jury: "Insulting words, gestures, or actions will not reduce an unlawful killing from murder to manslaughter, unless the gestures or actions are such as to reasonably induce the belief of danger to life, or of great bodily harm, in the mind of the party against whom they are used." If the party against whom actions "are used" reasonably believes that he is in danger of losing his life, or of receiving great bodily harm, the killing of his assailant is justifiable, and such killing is not "unlawful." The jury were the sole judges of the credibility of the witnesses. Upon the jury was imposed the task of determining which, if any, of the statements of each witness were to be believed. A careful examination of the bill of exceptions shows that there was evidence before them upon which they might have based a verdict—guilty of manslaughter. The charge was plainly erroneous in respect to a material matter.

As appears from the bill of exceptions, on the fourteenth day of September, 1882, "counsel for the prosecution moved the court to grant an order setting aside the order of this court made and entered on the eighth inst., overruling the demurrer to the information herein, and allow the prosecution to confess said demurrer, which motion is granted; and it is therefore ordered that the said order overruling the said demurrer made and entered herein on the eighth day of September, 1882, be, and the same is hereby, set aside and vacated. Counsel for the prosecution thereupon confessed the said demurrer, and upon suggestion of the counsel for the prosecution the court orders that the district attorney file a new information against the defendant," etc.

Section 1007 of the Penal Code reads: "Upon considering the demurrer, the court must give judgment either allowing or disallowing it, and an order to that effect must be entered upon the minutes." It is contended by appellant that the demurrer "confessed" by the prosecution was never finally disposed of; that no order was entered in the minutes allowing or disallowing it. It would certainly have been more regular to have entered an order expressly allowing the demurrer, but we think the order allowing the prosecution to confess that the demurrer was well taken, followed by a direction that the district attorney file another information, was an order "to the effect" that the demurrer be allowed.

It is contended by appellant that the court below erred in disallowing defendant's demurrer to the information filed September 22, 1882.

Section 951 of the Penal Code provides: The indictment or information may be substantially in the following form:

"The People of the State of California against A. B., in the superior court of the county of ———, the ——— day of ———, A. D. 18—. A. B. is accused by the grand jury of the county of ———, by this indictment, (or by the district attorney, by this information,) of the crime of (giving its legal appellation, such as murder, arson, or the like, or designating it as felony or misdemeanor) committed as follows: The said A. B., on the ——— day of ———, A. D. 18—, at the county of ———, (here set forth the act or omission charged as an offense,) contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California."

The information is entitled: "In the Superior Court of the County of ———, State of California. *The People of the State of California against Patrick Biggins*. Information for murder." It proceeds: "Patrick Biggins is accused by the district attorney of the said county of *Fresno*," etc. We think the omission of the name of the county in the title is a technical error or defect which did not affect the substantial rights of the defendant. It must therefore be disregarded by this court. Penal Code, 1258. The information concludes: "Contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the state of California."

The information sufficiently avers that the acts of defendant were "contrary to the force and effect of the statute." The objection that it only charges that deceased died contrary to the form, force, etc., is hypercritical.

Judgment and order reversed, and cause remanded for a new trial.

65 Cal. 568

PEOPLE v. PERRY. (No. 10,958.)

Filed September 1, 1884.

1. CRIMINAL LAW AND PROCEDURE—JURY RETURNING FOR FURTHER INSTRUCTIONS.

A trial court possesses the inherent power to cause the jury to be returned for further instructions whenever the judge becomes convinced that he has not made them fully to understand an appropriate proposition of law, or has omitted to state portions of the testimony proper to be stated. Section 1338 of the Penal Code only declares the right of the jurors to demand to be reconducted into court, and does not prohibit the judge from charging the jury after they have retired, and without their request.

2. SAME—INSTRUCTION AS TO EVIDENCE.

If testimony has been introduced to prove certain facts, the court may instruct the jury that testimony has been introduced tending to prove such matter, and such instruction is not an expression of the opinion of the court as to the weight or effect of the evidence, nor as to what fact has been proved.

Department 1. Appeal from the superior court of the city and county of San Francisco.

John D. Whaley, for appellant.

The Attorney General, for respondent.

McKINSTRY, J. No substantial error was committed by the court below. Two hours after the jury had retired for deliberation, the court, without any request on the part of the jurors, directed that they be brought in, and proceeded to recharge them. It is not complained that the court erred in its recharge with respect to any matter of law, but it is contended that, by section 1138 of the Penal Code, the court is prohibited from charging a jury after they have retired, unless they shall themselves request the officer to conduct them into court. In the case at bar defendant and his counsel were present when the order was made that the jury should be brought in, and when the additional charge was given, but, so far as appears from the transcript, no objection was made to the order until after the charge was concluded. We think, however, that section 1138 only declares the right of the jurors to demand to be reconducted into court. It is not a limitation upon the power of the court. The court possesses an inherent power to cause the jury to be returned for further instructions, a power wisely employed whenever the judge becomes convinced that he has not made them fully to understand an appropriate proposition of law, or has omitted to state portions of the testimony proper to be stated.

It is insisted that the court violated section 19 of article 6 of the constitution, which reads: "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." The court said: "The testimony there certainly could be no misunderstanding with regard to." And further: "I state as testimony in the case, the only testimony in the case touching the time when the watch was taken, is that tending to show it was taken near the door, and that of the defendant that he picked it up in front of the counter," etc. It is always safer to read testimony from the judge's notes, or from the short-hand reporter's notes, if the judge can adopt them as correct; but if testimony has been introduced to prove a certain matter, the court may instruct the jury that testimony has been introduced tending to prove such matter, and such instruction is not an expression of the opinion of the court as to the weight or effect of the evidence, nor as to what fact has been proved. *People v. Vasquez*, 49 Cal. 560. It is not denied by appellant that there was testimony "tending to prove" that the watch was taken near the door, nor is it denied that defendant alone testified that "he picked it up near the counter." The use of the word "taken" in the connection in which it was employed did not imply an opinion of the judge that there had been a felonious taking. Nor was there fatal error in the statement that there could be no misunderstanding in regard to the testimony, which was merely a declaration that the words and meaning of the witnesses were clear and unambiguous. The credit to be extended to the testimony of each was left with the jurors, and ap-

pellant does not suggest that there was any doubt as to the meaning conveyed by the statements of the several witnesses. The judge did not charge the jury with respect to matters of fact within the meaning of the section of the constitution.

Judgment and order affirmed.

We concur: McKEE, J.; ROSS, J.

65 Cal. 562

FORRESTER, Com'r, etc., v. DUNN, State Comptroller. (No. 9,633.)

Filed September 1, 1884.

COMMISSIONER OF IMMIGRATION—SALARY AND OFFICE EXPENSES—POWER OF STATE COMPTROLLER.

The state comptroller is not authorized by the act of March 15, 1883, to pay the salary and office expenses of the commissioner of immigration out of any money in the treasury which was the excess of moneys collected beyond salary and expenses prior to the date of said act; but the salary and expenses of such commissioner should be paid only out of the fund made up from fees collected, fines, etc.; which were required by the terms of the act to be paid into the treasury, without any deduction for salary and office expenses.

Department 1. Petition for writ of *mandamus*.

Langhorne & Miller, for petitioner.

Atty. Gen. Marshall, for respondent.

McKINSTRY, J. Defendant has demurred to the petition for writ of mandate commanding defendant to audit the salary of petitioner and his accounts of expenses of his office.

Section 2955 of the Political Code reads:

"The commissioner of immigration must satisfy himself whether or not any person who shall arrive in this state, by vessel, from any foreign port or place, is a leper, or affected with the disease known as leprosy or elephantiasis, before such person shall mingle with the population of this state. * * * For his services in making such examination and inspection, the commissioner of immigration shall demand and collect from the master, owner, or consignee of such vessel the sum of seventy cents in United States gold or silver coin, for each and every person so examined or inspected, which sum, except four thousand dollars a year and expenses of office, shall, when required for such purpose, be paid by the commissioner into the state treasury, to be used in the maintenance, when necessary, of such lazarettos or lepers' quarters as shall be constructed under this law," etc.

By the section above recited the commissioner is authorized to retain, out of the moneys collected by him, his salary, at the rate of \$4,000, and the expenses of his office, and it is his duty to pay the balance only into the state treasury when required for the maintenance of lazarettos, etc. It must be presumed that the commissioner in office, while all the provisions of section 2955 were in force, did retain his salary and office expenses out of the moneys collected by him,

and paid the balance only into the state treasury. Under that section all the moneys paid into the state treasury were paid to be applied to the support of lazarettos or lepers' quarters, and were subject to no claim of the commissioner for salary or office expenses. By the act of March 15, 1883, a new system was adopted. St. and amendments to Codes 1883, p. 368. By that act the commissioner is required to pay into the state treasury "all *per capita* fees collected by him, and moneys derived from fines, penalties, and forfeitures." And the comptroller is directed to audit the salary and office expenses of the commissioner and to draw his warrants for the same on the fund composed of the *per capita* fees, fines, penalties, and forfeitures so paid in by the commissioner: "provided, however, that no such account for salary and office expenses shall be audited in excess of the amount of 'leprosy funds' on hand," etc.

It is apparent from the reading of the act that it was not the intention of the legislature that the salary and office expenses of the commissioner should be paid out of any money in the treasury, being the excess of moneys collected beyond salary and office expenses prior to the passage of the act of March 15, 1883, but that the salary and office expenses of the commissioner, after that act went into effect, should be paid only out of the fund made up from fees collected, fines, etc., which were required by its terms to be paid into the treasury, without any deduction for salary and office expenses. The petitioner took office, April 1, 1883, after the amendatory law went into operation, and, as we construe the laws, can at most only claim to be paid his salary, etc., out of the moneys paid into the treasury after March 15, 1883.

Writ denied and proceeding dismissed.

We concur: ROSS, J.; McKEE, J.

65 Cal. 567

JOHNSON v. SUPERIOR COURT OF TULARE CO. (No. 9,141.)

Filed September 1, 1884.

WATER-RIGHTS—INJUNCTION PENDING LITIGATION.

The superior court has jurisdiction to grant a preliminary injunction restraining the defendant from interfering with the flow of water of a certain stream, pending a litigation in regard thereto, and its jurisdiction is not exceeded when it requires the removal of the means by which the diversion is made. It therefore properly exercised its jurisdiction in adjudging the petitioner guilty of contempt for failure to obey such order.

Department 1. Application for writ of *certiorari*.

Brown & Daggett, for petitioner.

Ross, J. In an action brought by one Bliss against the petitioner and others to enjoin them from diverting the waters of a certain

stream, the superior court granted a preliminary injunction, commanding the defendants to remove the obstructions by which they diverted the said waters, and to permit them to flow undisturbed in the stream, pending the action. Whether there was error in granting the injunction is not now for consideration. The case being here upon *certiorari*, the inquiry, of course, goes only to the power of the court to make the order. The jurisdiction of the court to grant a preliminary injunction restraining the defendant from interfering with the flow of water pending the litigation cannot be doubted, and we cannot see that its jurisdiction is exceeded when it requires the removal of the *means* by which the diversion is made. The ultimate aim of the injunction is the undisturbed flow of the water. The objections to the removal of the means by which the diversion is made are no more cogent than the objections to preventing the diversion of the water itself. Upon the hearing in the court below there was testimony tending to show that after the dam that diverted the water had been in part removed it was rebuilt by the direction of petitioner, and the diversion of the water continued, notwithstanding the injunction of the court. We do not think the court exceeded its power in adjudging the petitioner guilty of contempt.

Writ denied, and petition dismissed.

We concur: McKEE, J.; McKINSTRY, J.

2 Cal. Unrep. 364

FLEMING v. HAWLEY. (No. 8,854.)

Filed September 1, 1884.

PRACTICE—CONTINUANCE—DISMISSAL OF COMPLAINT—INTERVENTION.

The granting of a continuance and dismissal of a complaint in intervention being, under the circumstances, discretionary with the court, *held that*, where there is no abuse of discretion, the order of the lower court refusing the same will not be interfered with on appeal.

Department 1. Appeal from the superior court of Tulare county. This was an action for the recovery of certain flasks of quicksilver. Defendant denied plaintiff's right to the same, claiming ownership in himself. The Empire G. & S. M. Co., being allowed to intervene, claimed possession and ownership in itself, which was denied by both plaintiff and defendant. On the trial, no counsel appearing for the intervenor, the defendant's counsel, in behalf of the intervenor, moved for a continuance, which, being refused, he moved for a dismissal of the complaint in intervention without prejudice. This was refused, and thereafter judgment was rendered for plaintiff and against defendant. The intervenor now appeals.

W. H. Hart and Atwell & Bradley, for appellant.

Edwards & Dubrutz, for respondent.

By THE COURT. We cannot say the court below abused its discretion in refusing a continuance of the trial of the cause. Nor, under the circumstances appearing, can we hold as error the refusal of the court to permit the dismissal of the complaint in intervention. There was no judgment against the intervenor for costs, as seems to be supposed by counsel.

Judgment and orders affirmed.

65 Cal. 570

ROSE v. SUPERIOR COURT OF NEVADA CO. (No. 9,662.)

Filed September 2, 1884.

PRACTICE—CONTINUANCE—PENDING SUIT IN FEDERAL COURT.

It is competent for a state court to continue the trial of an action to recover possession of land claimed by plaintiff as agricultural land, under a United States patent, for a reasonable time, to abide the determination of a suit in the federal courts, in which the validity of the patent is sought to be impeached for fraud.

In bank. Petition for writ of *mandamus*.

Chas. W. Kitts, for petitioner.

MYRICK, J. This is an application for a writ of mandate commanding the superior court to set down a case for trial and to proceed with the trial thereof in due course. The facts upon which the court refused to proceed with the trial are presented to us substantially as follows: The petitioner, Rose, commenced an action against several defendants to recover the possession of a tract of land, plaintiff's title being a patent from the United States. The defendants, answering, among other defenses, set up that the patent was obtained through fraud. This last defense was, on motion, stricken out, on the ground that the patent could not be attacked in that action, and the court set a day for trial as to the other issues. On the day fixed for the trial the defendants moved a continuance, on the ground that they were in possession of the premises by location of mining claims under the laws of the United States; that the patent of the plaintiff had been obtained by fraud, in that the premises being in fact mining ground were not subject to being patented to plaintiff, the patent being for agricultural land; and that a suit had been commenced (and was then pending) in the proper federal court, by the attorney general of the United States, for the purpose of having the patent declared fraudulent and set aside. The motion was resisted by the plaintiff, who filed counter-affidavits, denying the alleged fraudulent acts. The court granted the motion for a continuance, and made an order continuing the trial of the cause until the further order of the

court, or until the determination of the validity of the patent by the United States court. This order was made May 29, 1884. On the second of June, 1884, the court refused to set aside this last order, and refused to set the case down for trial. Thereupon the plaintiff (petitioner here) made application for the writ of mandate.

We think it was competent for the court to continue the cause a reasonable time, to abide the determination of the suit in the federal court. If the hearing of that cause shall be unreasonably delayed or postponed, the petitioner will be entitled to have her case in the superior court proceeded with; but it does not appear that unreasonable delay has as yet occurred.

Writ denied.

We concur: THORNTON, J.; MCKINSTRY, J.; MORRISON, C. J.

65 Cal. 572

In re Estate of CURTISS, Deceased. (No. 9,219.)

Filed September 3, 1884.

ESTATES OF DECEDENTS—ACCOUNT OF ADMINISTRATRIX—EQUITY JURISDICTION.

If an executrix die without having rendered to the probate court any account, report, or exhibit of the estate of which she was executrix, a court of equity alone has the power to adjust her accounts with such estate. In case she be one of the heirs to the estate, a settlement of her accounts is then a prerequisite to a distribution.

Department 1. Appeal from the superior court of Yolo county.

Freeman & Bates, for appellant.

Chas. F. Hanlon, for respondent.

Ross, J. L. M. Curtiss died testate in the county of Yolo on the thirty-first of December, 1870, leaving surviving him his widow, Esther Cordelia Curtiss, and three sons, Wilber C., Gilbert L., and Harvey T. Curtiss. All of the estate of the decedent, which was a large one, was the common property of himself and his said wife. By the will of decedent, his widow was nominated executrix, and upon the probate of the will she was duly appointed executrix, and thereupon entered upon the discharge of the duties of her trust. By his will, the testator, after making provision for an orphan, and a bequest of \$5,000 to a grandson, bequeathed all of his estate remaining after the payment of his debts to his widow and sons in equal parts. During the widow's administration of the estate she paid to two of the sons—Wilber C. and Gilbert L. Curtiss—\$50,000 each. This sum, it seems, was estimated to be one-fourth of the estate of the deceased remaining after the payment of his debts and his special bequests, and was accepted by Wilber C. and Gilbert L. Curtiss as their full share of the estate. Subsequently and on the seventh day of January, 1880, the widow re-

signed her trust as executrix, and on the twenty-ninth of January, 1881, died without having filed any account, report, or exhibit of the estate of her husband, or of its management by her. After the resignation of the executrix, and on the fifth of April, 1880, Gilbert L. and Wilber C. Curtiss were appointed administrators of the estate of L. M. Curtiss, deceased, and qualified as such. An administrator of the estate of the deceased, Esther Cordelia Curtiss, was also duly appointed, and entered upon the discharge of the duties of his trust. The administrators of the estate of L. M. Curtiss, deceased, presented to the probate court a final account of their administration of the said estate, together with a petition for a decree of distribution of the estate, and it is from the decree of distribution that this appeal is taken by the successors in interest of Esther Cordelia Curtiss, who, prior to the death of the latter, succeeded to whatever interest she had in the estate of L. M. Curtiss, deceased. The decree from which the appeal is taken distributed all of the estate of L. M. Curtiss, deceased, remaining in the hands of the administrators, to Harvey T. Curtiss, to the exclusion of the successors in interest of Esther Cordelia Curtiss. This action of the court below was based on a finding made on the hearing of the petition for distribution, to the effect that, excepting the property remaining in the hands of the administrators, and the money paid for expenses of administration and as legacies and shares under the will of the decedent, Esther Cordelia Curtiss "converted all of the residue of the estate of L. M. Curtiss, deceased, to her own use; and, by reason of her unprofitable investments, speculations, extravagance, and gifts, she, the said Esther Cordelia Curtiss, did, prior to October 21, 1879, lose and give away all the residue of said estate prior to her decease and the fourth day of November, 1879, and she afterwards, in 1881, died insolvent; that her estate is now insolvent; and that the amount of the said estate which she has thus converted to her own use is at least equal to and also exceeds the amount and share of the estate to which she is or ever was entitled."

Appellants contend that the matters stated in the finding just quoted could not be legally determined by the probate court; that the conduct of Esther Cordelia Curtiss with respect to the estate of which she was executrix could only be inquired into in a proceeding where the court would have jurisdiction of her, or her legal representative; and that she having been permitted to resign her trust as executrix, and to die without ever having rendered to the probate court any account, report, or exhibit of the estate of L. M. Curtiss, deceased, or of its management by her, a court of equity alone has the power to adjust her accounts with the estate of which she was executrix. It has been so held here in a number of cases, the last-reported one being *Chaquette v. Ortet*, 60 Cal. 594. It is obvious that an adjustment of the accounts of Esther Cordelia Curtiss with the estate of which she was executrix is prerequisite to a distribution of the estate

to which she was one of the heirs. For this reason the judgment and order must be reversed, and the cause remanded for further proceedings. So ordered.

We concur: MCKINSTRY, J.; MCKEE, J.

65 Cal. 574

SECURITY SAVINGS BANK *v.* CONNELL and others. (No. 8,279.)

Filed September 3, 1884.

ESTATES OF DECEDENTS—FORECLOSURE OF MORTGAGE—ALLOWANCE OF CLAIM.

In an action to foreclose a mortgage against the estate of a deceased mortgagor, where the complaint expressly waives all recourse against any property of the estate other than the mortgaged premises, it is not necessary that the claim shall have been presented to the administratrix for rejection or allowance.

Department 2. Appeal from the superior court of the city and county of San Francisco.

W. H. Spencer for appellant.

E. Jackman and McD. R. Venable, for respondents.

BY THE COURT. The claim being one secured by mortgage, and the plaintiff in its complaint having expressly waived all recourse against any property of the estate other than the mortgaged premises, it was not necessary to present such claim to the administratrix for allowance or rejection. Section 1500, Code Civil Proc., as amended in 1876. Therefore, it was not necessary that plaintiff should set forth in its complaint any such presentation.

Judgment reversed and cause remanded, with directions to overrule the demurrer of the administratrix, with leave to her to answer the complaint within 10 days after notice of the order overruling said demurrer.

65 Cal. 575

MORRELL, by her Guardian, *v.* MORGAN. (No. 9,397.)

Filed September 4, 1884.

1. SEDUCTION—ACTION BY MINOR—STATUTE OF LIMITATIONS.

The time within which an action may be brought by a female for her own seduction does not commence to run until she has arrived at the age of majority.

2. SAME—DEMURRER—WANT OF GUARDIAN.

A demurrer to the complaint on the ground that the plaintiff is a minor, and has no legally appointed guardian, and therefore has no legal capacity to sue, does not raise a question as to the sufficiency of an allegation of appointment of guardian for such minor. In absence of any objection, testimony as to who was the guardian of such minor is sufficient proof of such fact.

3. SAME—EVIDENCE—AGE OF MINOR.

The testimony of a witness as to her age is admissible, though her knowledge is derived from statements by her family, being considered as declarations of members of the family.

4. SAME—RES ADJUDICATA—ACTION BY GUARDIAN.

An action by an infant for her seduction, and judgment against her in that action on the ground that the same was barred by the statute of limitations, is not a bar to an action by the infant, suing by her guardian, for such seduction.

5. SAME—CONSENT OF PLAINTIFF TO SEDUCTION.

Consent of plaintiff to her seduction, if procured by persuasion, inducement, or artful means, will not defeat her right to sue for such seduction.

Department 2. Appeal from the superior court of Modoc county.

F. W. Ewing, for appellant.

E. V. Spencer, for respondent.

MYRICK, J. This is an action for damages growing out of the seduction of plaintiff by defendant.

1. The defendant demurred on the ground that the alleged seduction is averred to have taken place in May, 1881, and the action not having been brought until March, 1883, it is barred by section 340, subd. 3, Code Civil Proc. At the commencement of the action the plaintiff was a minor under 18 years of age. The statute above referred to must be read in connection with section 352, Code Civil Proc., and, so reading it, the action was not barred.

2. The second ground of demurrer is "that plaintiff has not legal capacity to sue, for the reason that plaintiff is a minor, and has no legally appointed guardian." The allegation of the complaint as to guardian is that the plaintiff is a minor under 18 years of age, and "that George Bellas is her duly-appointed and acting guardian." It will be observed that the ground of demurrer is not that the averment as to guardian is not sufficient, but that "she had no legally appointed guardian." The language of the demurrer is not sufficient to raise an issue of law.

3. The defendant urges that there was no evidence showing that George Bellas or any person was the guardian of the plaintiff. The testimony on this point was as follows: "*Question*. State whether Mr. Bellas is your guardian. *Answer*. He is." No objection offered to the testimony. Such being the case, no error appears.

4. The plaintiff, being a witness as to her age, was asked if she knew, from what her aunt and her relations told her, how old she was when she went to Gee's, answered 12 years, and at the time of trial 16 years. This was objected to, and the objection overruled. No error is apparent. The evidence was admissible as declarations of members of the family. 1 Greenl. Ev. § 104.

5. A former action had been brought by plaintiff, not averring infancy. That suit was commenced August 22, 1882, and the seduction was averred to have occurred in May, 1881, more than one year prior thereto. The defendant demurred to the complaint on the ground, among others, that the action was barred. The demurrer

was sustained, without stating upon what ground, and judgment thereon rendered. That judgment was no bar to this action.

6. There is no error in the instruction given to the jury as to the consent of plaintiff being procured by any persuasion or inducement or artful means. We do not see that the jury were at all misled, or that the law was not correctly stated.

7. No error appears in the refusal of the court to give the instruction asked by defendant.

Judgment and order affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

65 Cal. 577

McPHERSON *v.* BARTLETT and others.

Filed September 5, 1884.

CONSTITUTIONAL LAW—TERM OF SENATORS—ACT OF 1882—ELECTION OF SUCCESSORS—ACT OF 1883.

The term of office of senators elected from senatorial districts designated by the odd numbers, in the year 1882, is two years only. Under the act of 1883, their successors, to be elected in 1884, will hold for two years only.

In bank. Application for writ of *mandamus*.

W. T. Wallace, for petitioner.

J. P. Hoge, W. T. Buggett, and Craig & Meredith, for respondents.

Ross, J. The provisions of the constitution with respect to the election of senators are perfectly plain, and if the legislature of 1881 had districted the state in accordance with the command contained in section 6 of article 4 of that instrument, the scheme therein devised would have been put in perfect and harmonious working. But the legislature of 1881 failed to perform its duty in that regard. If the constitutional mandate had been obeyed, the state would have been divided into 40 senatorial districts, numbered from 1 to 40, inclusive, prior to the election of 1882, each of which districts would have elected one senator in that year,—those from the even-numbered districts to hold their office for four years, and those from odd-numbered districts to hold for two years,—and thereafter the term of each senator to be four years, so that one-half of the senators would be elected every two years. But the state not having been divided into 40 senatorial districts prior to the election of 1882, the question is, what is the result?

There is no doubt that, as a matter of fact, the whole number of senators—40—were elected in the year 1879, who held office for the term of three years, and that the whole number—40—were elected in the year 1882. Now, where was the authority for those elections, in the absence of the 40 senatorial districts? It is found, and can

only be found, in the concluding clause of section 6 of article 4 of the constitution, which is in these words: "Until such districting as herein provided for shall be made, senators and assemblymen shall be elected by the districts according to the apportionment now provided for by law;" that is to say, by the act of the legislature, approved March 16, 1874, by which the state was divided into 29 senatorial districts, numbered from 1 to 29, inclusive, and according to which there were 20 senators from the districts designated by odd numbers and 20 senators from the districts designated by even numbers. In other words, the constitution expressly kept in existence the districts established by the act of 1874 until the legislature should establish the 40 districts it was commanded to establish. It was from the 29 districts, as designated in the act of 1874, that the 40 senators were elected in 1879, and it was from those same districts that the 40 senators were elected in 1882, 20 of whom were elected from districts designated by odd numbers. Now, then, by section 5 of article 4 of the constitution, it is declared: "The seats of the twenty senators elected in the year eighteen hundred and eighty-two from the odd-numbered districts shall be vacated at the expiration of the second year, so that one-half of the senators shall be elected every two years."

In view of this language I do not see how it can be successfully contended that the 20 senators elected in the year 1882 from the odd-numbered districts shall continue in their seats for *four* years. It seems to me their seats become vacant at the expiration of the second year, and must be filled at the ensuing election from the districts designated in the act of 1874 by odd numbers, which, as has been seen, is in express terms continued in existence by the concluding clause of section 6 of article 4 of the constitution, there not yet being in effect any act of the legislature dividing the state into 40 senatorial districts. There is an act, however, passed by the legislature of 1883, and which goes into effect July 1, 1886, by which the state is divided into 40 senatorial districts, numbered from 1 to 40, inclusive, as required by section 6 of article 4 of the constitution, and which, in its forty-second section, provides:

"At the general election in the year eighteen hundred and eighty-six there shall be elected forty senators, one from each senatorial district. The senators electors from the odd-numbered districts in the year eighteen hundred and eighty-six shall hold office for two years. Their successors shall be elected in the year eighteen hundred and eighty-eight, and every four years thereafter. The senators elected from the even-numbered districts shall hold office for four years. Their successors shall be elected in the year eighteen hundred and ninety, and every four years thereafter."

The legislature of 1883 thus performed the duty that was left unperformed by the legislature of 1881. The effect of all this, of course, will be to reduce the term of the 20 senators to be elected at the ensuing election of 1884 to two years. But this effect will have been caused by the delay in putting the scheme devised by the constitution

into execution, and will be no more than the effect that must always attend the adjusting of the legislative districts every 10 years, as required by the constitution, based upon the census taken under the direction of the congress of the United States.

Let the writ issue as prayed for

We concur: MYRICK, J.; McKEE, J.

THORNTON, J., *concurring*. I concur in what Justice Ross has said above, and in the conclusion reached by him, and will add that while in my judgment the framers of the constitution expected that the legislature of 1881 would district the state as required by section 6 of article 4, that they did not fail to provide for the neglect of the legislature to do so; that this provision is made by the final clause of section 6, the words of which are quoted in the opinion of Justice Ross; that the mandate of the constitution, that "the seats of the twenty senators elected in the year 1882 from the odd-numbered districts shall be vacated at the end of the second year," was intended to apply alike to the system directed by the constitution to be created by the legislature in 1881, and to the system continued in operation by the final clause of section 6, until the districting enjoined by the constitution was made; that the purpose of vacating the seats of the 20 senators above mentioned at the end of the second year after their election in 1882 was distinctly declared in the constitution to be "that one-half of the senators should be elected every two years," and that this purpose was intended to be carried out in whichever of the two modes above referred to the senators were elected.

The construction given to the constitution in the opinion of Ross, J., harmonizes the provisions of the constitution relating to the elections and terms of senators.

We dissent: MORRISON, C. J.; McKINSTRY, J.; SHARPSTEIN, J.

SUPREME COURT OF CALIFORNIA.

(65 Cal. 533)

MEYER v. BROWN and others. (No. 8,896.)

Filed September 10, 1884.

1. MUNICIPAL CORPORATIONS—BONDS—ULTRA VIRES.

In an original proceeding in the supreme court to compel the payment of certain bonds of a municipal corporation, where the *bona fides* of the plaintiff is conceded, the only question to be decided is whether such corporation had the power to issue bonds of such a character. No question of irregularity, or even fraud, on the part of the agents of the municipality can be considered.

2. MANDAMUS—REFERENCE—NEW TRIAL—RULE OF COURT.

In cases where the facts shall be found by a referee appointed by this court, and either party shall have given notice of motion for a new trial within 10 days after receiving notice that findings have been filed, the argument of the cause will not be heard until the motion for a new trial shall have been determined; nor will argument be heard upon the findings of a referee—no notice of motion for new trial having been served—unless 10 days shall have expired after notice of the filing of such findings.

In bank. Proceeding by *mandamus* to compel the payment of certain Sacramento bonds.

Rosenbaum & Sheeline and *S. C. Denson*, for plaintiff.

W. A. Anderson and *McKune & George*, for defendants.

BY THE COURT. This is a motion for a new trial. At the trial before the referee defendants offered to prove facts which, it is claimed, would have shown that certain of the bonds described in the complaint herein, the payment of which is sought to be enforced by the mandate of this court, were issued in consideration of the surrender of bonds purporting to represent indebtedness of the city of Sacramento, which bonds (last named) had been illegally issued, and did not constitute valid claims against the said city. It is contended by the defendants that the referee erred in rejecting the evidence offered.

We deem it unnecessary to inquire whether, assuming the facts to be as implied by the defendants' offer of evidence, the bonds, in lieu of which the bonds in suit were issued, were invalid. True, the act of 1858 (St. 1858, p. 280) provided that all "legal" claims might be funded; but, as we understand the provisions of that act, the president of the board of supervisors, the clerk of the board, and the treasurer were authorized to determine on behalf of the city and county of Sacramento the legality of each claim presented, and, if satisfied of its legality, to issue a bond or bonds therefor. Even if the evidence offered would have shown that the officers mentioned violated their duty by deciding some claims to be legal which they knew were illegal, there was no offer to prove that the claims alleged to be the consideration for the bonds sought to be enforced by this proceeding

were presented by plaintiff, or that any of such bonds issued to him.

There is no averment in the answer, nor is there any finding in the record, or any evidence tending to prove, that plaintiff is other than a holder *bona fide* of the bonds. The bonds recite that they were issued in accordance with the law of 1858; they and the coupons attached are signed and authenticated as required by that law. They are exactly such bonds as would have been authorized had the officers of the city and county indisputably allowed only "legal debts and liabilities" of the former corporation, the city of Sacramento. At the trial, the *bona fides* of the plaintiff being conceded, there was but one question to be decided, to-wit, were the bonds such as the city and county had power to issue? No question of irregularity, or even fraud on the part of the agents of the municipality, could be considered. *Ronede v. Jersey City*, 17 Reporter, 263; *East Lincoln v. Davenport*, 94 U. S. 801; *Pompton v. Cooper Union*, 101 U. S. 196; *Sherman Co. v. Simonds*, 109 U. S. 737; S. C. 3 Sup. Ct. Rep. 502; *Louisiana v. Pilsbury*, 105 U. S. 278.

Hereafter, in cases like the present, where the facts shall be found by a referee appointed by this court, and either party shall have given notice of a motion for a new trial within 10 days after receiving notice that findings have been filed, the argument of the cause will not be heard until the motion for a new trial shall have been determined. Nor will argument be heard upon the findings of a referee (no notice of motion for new trial having been served) unless 10 days shall have expired after notice of the filing of such findings. Motion denied.

65 Cal. 580

GOODDAY and another *v.* SUPERIOR COURT. (No. 9,596.)

Filed September 10, 1884.

1. INSOLVENCY—DEBTOR—ORDER OF EXAMINATION.

In a proceeding in insolvency, the court may order an examination of the debtor of its own motion, and such an order at the instance of the receiver is not invalid.

2. SAME—JURISDICTION.

Where, in a proceeding in insolvency, the court had jurisdiction of the insolvents and of the estate, and persons examined admitted that they had money in their hands, and admitted it belonged to the estate, the court had jurisdiction to order it to be paid to the assignee without suit.

Department 2. Application for writ of *certiorari*.

Mr. Belcher, for petitioner.

MYRICK, J. *Certiorari* to review the action of the superior court in proceedings in insolvency. The court had adjudged the parties insolvent, and had appointed a receiver to take charge of the estate. Then, on the petition of the receiver, the court made an order that the insolvents appear and be examined touching the affairs of the

estate. After such examination was had, the court found from the examination and the mercantile books of said insolvents that Breslauer then had in his possession and control \$2,000 belonging to the estate of the insolvents, which he had neglected and refused to pay to the assignee, and that Goodday had in like manner \$6,000, and ordered that they deliver such sums, respectively, to the assignee within five days.

Two grounds of error are urged: (1) That the receiver had no right to apply to have the examination; (2) that the court had no power to direct the delivery of the money. An answer to the first objection is found in section 47 of the insolvent act of 1880. The court may make the order for examination of the debtor upon the application of the assignee, or of any creditor, or without any application. If the court could, *of its own motion*, make the order for the examination, we apprehend that the order was not weighted down by having been made at the instance or suggestion of the receiver.

As to the second point. We see no excess of jurisdiction. The court had jurisdiction of the insolvents and of the estate. The evidence on which the court found that the money belonged to the estate is not before us; therefore we may presume the finding was based on incontrovertible testimony. It may be that the persons examined had the money in their hands and admitted it to belong to the estate. In such case we think the court had power to order it to be delivered to the assignee without suit. Of course, if the money had been in the hands of other persons, claiming an interest, the assignee would have been driven to his action.

Order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

65 Cal. 582

MANSIR v. SUPERIOR COURT OF SAN DIEGO CO. (No. 20,017.)

Filed September 10, 1884.

CRIMINAL LAW—BAIL—BENCH-WARRANT—JURISDICTION.

A prisoner arrested on a bench-warrant cannot be taken before the magistrate of any county other than that from which the warrant issued, or where the prisoner was arrested, for the purpose of giving bail. Penal Code, § 1284.

Department 2. Application for writ of *certiorari*.

Schell & Bond, for petitioner.

BY THE COURT. In the Penal Code, under the head of "Bail upon an Indictment before Conviction," we find the following provision:

"1284. When the offense charged is not punishable with death, the officer serving the bench-warrant must, if required, take the defendant before a

magistrate in the county in which it is issued, or in which he is arrested, for the purpose of giving bail."

Petitioner was arrested in Stanislaus county, on a bench-warrant issued in that county. He cannot be taken before a magistrate of any other county for the purpose of giving bail; and when taken before a magistrate of the county in which the bench-warrant was issued, or in which he was arrested, the proceedings pointed out in sections 1279, 1280, and 1281 may be had. But they cannot be had in a county in which the bench-warrant was not issued nor the arrest made. Application denied.

65 Cal. 591

SILVA and others v. GARCIA. (No. 9,605.)

Filed September 12, 1884.

1. EQUITY—INJUNCTION—TRESPASS—WASTE.

An entry upon land, and digging up and removing fruit trees growing thereon, is more than a mere trespass, and in the eye of the law constitutes waste, and is a matter clearly for equitable interference by the court.

2. SUPERVISORS—OPENING OF PRIVATE ROAD—NOTICE.

In a proceeding to open a road across private land, the person whose rights are to be affected thereby, against his will, is entitled to notice.

In bank. Appeal from the superior court of Contra Costa county. *A. H. Griffith*, for appellant.

Sheffield & Wallace and *E. J. Emmons*, for respondent.

MORRISON, C. J. The complaint in this case contains three causes of action, each of which is separately stated. The first charges an entry upon plaintiff's land and the destruction of a fence thereon; the second charges a like entry and the destruction of valuable fruit trees growing on the land, by digging up the same, and also a threatened entry for a similar purpose; and the third charges that the board of supervisors of Contra Costa county did, on the seventh day of August, 1883, make an order establishing a private road over and across the same land and premises of plaintiffs, and defendant threatens to go upon said land and open said road, and, further, that he will do so, unless restrained by an order of the court. There was a demurrer to the complaint, substantially on the grounds that plaintiffs had a full and adequate remedy at law; and, *secondly*, that the complaint did not state sufficient facts to entitle plaintiffs to the extraordinary remedy of injunction. The demurrer was overruled, and an injunction was granted on the thirteenth day of March, 1884. Defendant moved to dissolve the injunction. Motion was denied April 30, 1884, and from the order denying the motion to dissolve, this appeal is prosecuted.

The principal point made and relied upon, on appeal, is that plain-

tiffs had a full and ample remedy in a court of law, and that the acts complained of were simple trespasses, for which an action sounding in damages was the proper and only remedy. It was something more than a mere trespass of which the plaintiffs complained. The entry upon the land, and digging up and removing the fruit trees growing thereon, constituted waste in the eye of the law, as it was an injury to the inheritance. *Hicks v. Michael*, 15 Cal. 115; *Merced Mining Co. v. Fremont*, 7 Cal. 319; *More v. Massini*, 32 Cal. 590. It was clearly matter for equitable interference by the court.

The third cause of action stated that the board of supervisors had made an order that the road should be opened, which order the defendant was about to execute. It is further charged that the order was made by the board of supervisors without giving the plaintiffs any notice of the proceeding to open the road. For this reason it is claimed that the order of the board was void for want of jurisdiction. "In such a proceeding the person whose rights are to be affected against his will must have notice." *Cruger v. Hudson River R. Co.* 12 N. Y. 190; *Curran v. Shattuck*, 24 Cal. 433.

We are of opinion that the facts set forth in the complaint were sufficient to entitle plaintiffs to an injunction, and therefore the court did not err in denying defendant's motion to dissolve the same.

Order appealed from affirmed.

We concur: SHARPSTEIN, J.; ROSS, J.; MYRICK, J.; MCKEE, J.; MCKINSTRY, J.; THORNTON, J.

65 Cal. 596

WILCOXSON v. STITT. (No. 9,398.)

Filed September 15, 1884.

VENDOR AND VENDEE—CONSTRUCTION OF CONTRACT—RIGHT OF ELECTION.

Where, in an agreement for the sale of land, the parties stipulate that, "in event of the failure to comply with the terms of the agreement, the vendor shall be released from all obligation to convey, and the vendee shall forfeit all right thereto, and the agreement shall be void," the meaning of such clause is that such agreement is void only at the election of the vendor, who can avoid it or enforce it at his option.

Department 2. Appeal from the superior court of Sutter county.
W. C. Van Fleet, for appellant.

I. S. Belcher, for respondent.

THORNTON, J. This action was instituted on a contract between plaintiff, of the first part, and defendant, of the second part, expressed in articles of agreement by which plaintiff agreed to sell to defendant a tract of land for the sum of \$18,480. Of this sum defendant paid one-half, and agreed to pay the remaining half on or

before the twenty-first day of March, 1878, together with interest from the date of the contract, at the rate of 10 per cent. per annum. The defendant also agreed to pay all state, county, township, district, road, and levee taxes that were due when the contract was executed, or that thereafter might become due on the land sold. The following stipulations also constitute a part of the contract:

"In the event of failure to comply with the terms and all the conditions hereof by the party of the second part, the party of the first part shall be released from all obligations, either in law or equity, to convey said property or any part thereof, and the said party of the second part shall forfeit all right thereto, and this agreement shall be void. And the said party of the first part, on receiving such payments, at the time and in the manner above mentioned, shall and will make, execute, and deliver to the said party of the second part a deed for all his right, title, claim, and interest in and to said lands hereinbefore described and mentioned."

The action was brought to recover the sum last mentioned in the contract, with interest, etc. Prior to bringing this action, plaintiff tendered a deed such as was required by the agreement, and at the same time demanded payment of the sum sued for, with interest, as set forth in the contract. Defendant refused to receive the deed or pay the money. The facts above mentioned, together with other facts not material to the determination of the cause, were found by the court below. Judgment was rendered for defendant, and plaintiff appealed.

It is contended here by counsel for respondent, to sustain the judgment, that, under the provisions of the agreement between the parties hereto, that on the failure of the defendant to pay the sum sued for, with interest, on the twenty-first of March, 1878, the agreement became wholly void; that both parties were thereupon released from all obligations under it; and that no action could be maintained on it. On this point we are referred to no pertinent authority by the respondent. *Gordon v. Swan*, 43 Cal. 564, has no application. The cases cited on behalf of appellant hold that such an avoiding clause as the one in the agreement before us is for the benefit of the vendor; that he has an option to avoid the agreement or enforce it; and that the vendee cannot take advantage of his own failure or neglect and avoid the agreement. *Mason v. Caldwell*, 5 Gilman, (Ill.) 196, was an action brought by the vendor against the vendee, to recover on certain notes given under the provisions of a contract of purchase of land, evidenced by a bond. In this case the question arose as to the meaning of a clause in the bond in these words:

"But should the said John R. Caldwell, or his assignee, fail to pay the said sum of money, specified in said notes, within ten days after the same become due, he thereby forfeits all claims to said lots and all the moneys paid thereon, and this bond, in such event, shall be void, both in law and equity, and the title to said lots shall continue in the original proprietor, as if no sale had been made."

As to this the court said:

"The defendant contends that he can take advantage of this clause, and, because he did not pay the money as he had agreed to do, he is exonerated from paying it at all. It is argued that because the obligee, in the event of non-payment, may treat the bond as determined, mutuality requires that the obligor should have the same privileges. This argument refutes itself. It is as much a *felo de se* as it would make the bond. To admit the defendant's position is to leave everything in his own hands. It allows him to defeat or make the bond operative, as may best subserve his interest, without any discretion on the part of the obligee. It converts the bond into a naked proposition absolutely binding on the seller, but which the purchaser may accept or reject by the payment or non-payment of the money. By thus putting the entire control in the hands of the latter, all mutuality is destroyed. It was the undoubted intention of both parties, when they inserted this clause, to provide a penalty to insure a prompt performance by the purchaser. By performance he leaves no discretion in the hands of the obligee, but has a right to enforce the bond, while, if he does not, he agrees to leave it optional with the other party to avoid the contract or not. Here was a real mutuality, for the purchaser had the first discretion; and, if he placed himself in the power of the party, it was by his own voluntary neglect to pay the money, as he had bound himself to do, and it was but a just penalty for violating his obligation. But this is not a case of first impression. This precise question has been fully settled by a number of decisions in other states. The first case to which we shall refer is that of *Canfield v. Westcott*, 5 Cow. 270, and two other cases are given in a note to that, where the same court had held the same rule; in the last of which, (*Church v. Ayres*, 5 Cow. 273,) almost the identical words are used which are found in the avoiding clause of this bond: 'Otherwise, these presents to be void, both in law and equity.' In all of these cases the court held that the avoiding clause was inserted for the benefit of the obligee, and that the obligor could not take advantage of his own neglect in the non-payment of the consideration. The same construction was given to a similar clause in the case of *Manning v. Brown*, 1 Fairf. 49. The same principle was sustained in Kentucky, in *Barbour's Ex'rs v. Brookie*, 3 J. J. Marsh. 511."

Canfield v. Westcott, 5 Cow. 270, was an action of covenant on articles of agreement under seal to recover certain installments of the purchase money. In that case the following clause in the articles came under consideration:

"The said Daniel [the defendant] hereby agrees that should he fail in performing any part of the above covenants, that this contract shall become void and of no effect; and that the said party of the second part (the testator) shall and may re-enter and take possession of the said premises, without hindrance or molestation."

The court said:

"The provision that this agreement should be void was for the benefit of the vendor. On the vendee's default the vendor might, therefore, consider the agreement void at his own election, or affirm it, and bring his action on the covenants, and they said this had been often so held in much stronger cases; as where the provision in the articles was general and positive, in the words of both parties, that if the vendee failed to perform, the contract shall be void."

In the report of *Church v. Ayres*, 5 Cow. 273, SAVAGE, C. J., who delivered the opinion of the court, said:

"The very point now raised was decided by this court on the same state of pleadings in *Van Rensselaer v. Fitch*. The case is not reported, but I have been favored by the late chief justice with the demurrer book and the decision of the court. Van Rensselaer sued Fitch on an article of agreement as follows: 'First, the said party of the second part (Fitch) agrees to purchase of the said party of the first part (Van Rensselaer) the lands hereinafter mentioned, and to pay him for the same the sum of \$3,296, in one year from the date thereof, with interest on the same till paid; *otherwise, these presents to be void, both at law and in equity.*' Van Rensselaer then covenanted that, the money being paid, he would convey. To a declaration on this contract the defendant demurred, and judgment was rendered for the plaintiff."

In *Cartwright v. Gardner*, 5 Cush. 281, the court, in considering a clause in a contract of a similar character with the one in this cause, remarked:

"It is often provided in leases, in strong and unqualified terms, that if the lessee neglects or refuses to pay rent, the lease shall be void; but it always has been held that the lessee cannot, in such cases, set up his own neglect as avoiding the lease. Though the terms are express and positive, that the lease shall be void, yet they are held to mean that the lease shall be void only at the election of the lessor, for whose benefit the provision is made."

In the light of these cases, and we find none to the contrary, we feel constrained to hold that the meaning of the clause under discussion in the agreement in this case is that such agreement is void only at the election of the plaintiff, who can avoid it or enforce it at his option.

The judgment must therefore be reversed; and, as in our view, the plaintiff is entitled on the facts found to a judgment for the amount sued for, with interest at the rate of 10 per cent. per annum from the date of the contract, the case is remanded, with directions to the court below to enter judgment for the plaintiff accordingly.

We concur: SHARPSTEIN, J.; MYRICK, J.

2 Cal. Unrep. 385

PACKARD v. JOHNSON. (No. 8,550.)

Filed September 11, 1884.

1. EVIDENCE—JUDGMENT—JUDGMENT ROLL.

Plaintiff cannot complain that a judgment book introduced by defendant did not prove the judgment, if he himself introduce evidence of the judgment by introduction of the judgment roll, although he introduced such judgment roll for another purpose only.

2. LIMITATIONS—PLEADING.

The statute of limitations is sufficiently pleaded by reference in the answer to the sections of the Code.

3. ADVERSE POSSESSION—COLOR OF TITLE.

A decree adjudging that a party or his grantor was the owner or seized of some estate in the lands in controversy, is a "decree or judgment of a competent court," so as to operate as color of title in favor of one who enters in good

faith under such a decree, and holds adversely for five years, and will entitle such person to the benefit of the statute of limitations.

4. QUITCLAIM DEED—TRANSFER OF TITLE.

A quitclaim deed is as effectual to transfer title as a grant, or bargain and sale.

5. EVIDENCE—TITLE—DECLARATIONS.

Evidence, with respect to his title, of declarations made by a party after he has disposed of his interest in the property, is not admissible.

6. ADVERSE POSSESSION—TITLE OF REAL OWNER.

One may hold adverse possession of lands so as to acquire title, without having knowledge of the nature of the title of the real owner.

7. PATENT TO LAND—CERTIFICATE OF PURCHASE—ACT OF 1858.

Where, under the act of 1858, a certificate of purchase of certain lands is issued to a person by the state, and it recites that payment in full has been made, such person thus acquires a perfect equity as against the state, and entitles him to the benefit of the statute of limitations from the date of the certificate.

8. SWAMP LANDS—STATE GRANT.

The legislature of the state has power to grant swamp and overflowed lands to private persons, and such lands are taken subject to state legislation in regard to the reclamation thereof.

Department 1. Appeal from the superior court of San Joaquin county.

J. B. Hall, for appellant.

J. H. Budd and *F. F. Baldwin*, for respondent.

By THE COURT. 1. It is contended by appellant (plaintiff) that the court below erred in admitting in evidence the entry of a judgment in the judgment book of the district court. It is urged that the only competent evidence of the judgment was the judgment roll. But, subsequently to the introduction of the *book* by defendant, the roll was introduced by plaintiff. It is said the plaintiff introduced the roll for the single purpose of proving the judgment to be *void*. The plaintiff having cured the defect in defendant's evidence of the judgment, cannot rely upon his *specific* objection that the judgment book did not prove the judgment. The validity or invalidity of the judgment is a very different matter.

2. The statute of limitations was sufficiently pleaded by the reference in the answer to sections of the Code. Code Civil Proc. 458.

3. But it is further claimed the judgment is void on the face of the roll, and was not, therefore, "the judgment of a competent court," such as could set the limitation running. Code Civil Proc. 322. "The decree or judgment of a competent court," mentioned in section 322 of the Code of Civil Procedure, is a decree or judgment adjudging that a party, or his grantor, was the owner or seized of some estate in the lands. One who enters in good faith under such a decree, like one who enters under a conveyance purporting to convey the fee, and who continues in adverse possession (evidenced by the acts mentioned in section 323) for a period of five years, may claim the benefit of the statute. It is sufficient if a *deed* under which the adverse possessor enters purports upon its face to convey the lands in question, and describes them with such definiteness that they can be easily identified,

although in fact it is *invalid* and insufficient to pass the title, or is voidable as a deed from an infant, or from *an officer who had no authority in fact to convey the land*; or although such authority, if he had any, *is not shown*; or although made under a sale which was subsequently invalidated by individual or judicial action. So, a tax collector's deed, a paper purporting to be a will, a deed from a mortgagee, or an unrecorded deed, is good color of title. Wood, Lim. p. 525, § 259, and cases cited.

The defendant having introduced the sheriff's deed purporting to convey the premises in controversy, it is immaterial that plaintiff proved the judgment to be void.

By section 323 of the Code of Civil Procedure it is enacted that land shall be deemed to have been possessed and occupied by one claiming under a written instrument: "Where it has been usually cultivated or improved; where it has been protected by a substantial inclosure."

Sanor, the grantee of the purchaser at the sheriff's sale, testified that immediately after taking his deed, on the twenty-fourth of September, 1864, he moved onto the land, built a barn and house, and fenced it and put stock on it. "I put a post fence and rails and plank around it—a four-board fence around part of the land, and a part three-board. I got the land fenced, and got my house and barn on it, three or four months after my purchase from Cocke. From the time I bought of Cocke I had the exclusive use of the land, and enjoyed all the profits until I sold to defendant." He then stated facts tending to prove that plaintiff had knowledge that he claimed to be the sole owner while he occupied it. And the defendant testified that *he* fenced the demanded premises, with other land, (the whole being land conveyed to himself and wife by Sanor, December 3, 1864,) soon after he received the deed from Sanor, all in one inclosure. "I have kept the land fenced ever since I first fenced it, and the road has been fenced ever since that time. I have occupied and used the land exclusively—fenced with my other land. During all that time I have claimed the ownership; nobody else has claimed it that I know of. If there have been any rents and profits I have had them. I have paid all the taxes on it with the rest of my land," etc. This action was commenced October 28, 1881. The foregoing testimony and other evidence in the record justified the jury in finding an *ouster* of plaintiff more than five years before the commencement of the action, and an adverse holding for more than the statutory period. If it be conceded that the judgment upon which the sheriff sold and conveyed to the grantor of defendant's grantor in 1860 was void, that fact did not deprive the defendant, or his grantor, Sanor, of the benefit of the statute. As we have seen, a sheriff's deed, although the officer has no authority to sell, may give color of title.

In *King v. Randlett*, 33 Cal. 318, the court, after deciding that the party there claiming the benefit of the statute of limitations, did not en-

ter under a deed or conveyance, but under an instrument only purporting to assign one's right, title, and interest in and to a constable's deed, added: "Whether, had Garrison conveyed to the defendant, the judgment and constable's deed would have been admissible as showing color of title in aid of defendant's plea, it is therefore unnecessary to determine. But upon this point see *Jackson v. Woodruff*, 1 Cow. 286, and *Gilbert v. Manchester Iron Co.* 7 Wend. 511."

Jackson v. Woodruff, so far as it bears upon the question before us, only decides that, where one claims under a deed as color of title, the description in the deed must include the lands in controversy. *Gilbert v. Manchester Iron Co.* is a miscitation. The court evidently intended to refer to *Livingston v. Peru Iron Co.* 9 Wend. 512. That was a case in chancery where the bill alleged that a conveyance of certain premises had been obtained by defendant by fraud. The court held a deed fraudulently obtained is not available as the foundation of an adverse possession, because the party setting up adverse possession must have entered *bona fide*.

We understand the court to have held, in *Bernal v. Gleim*, 33 Cal. 675, that the sheriff's deed in evidence in that case was void on its face. Certainly, none of the cases there cited sustain the proposition contended for by appellant in the case at bar. Besides the two New York cases already commented upon, *Jackson v. Frost*, 5 Cow. 346; *La Frombois v. Jackson*, 8 Cow. 589; and *Jackson v. Waters*, 12 Johns. 365, are referred to. In the first of the three cases last named, it was held, under the New York statute, that where one entered upon land, claiming it to be a *gore* between two patents, there was not such adverse possession against the true owner as would ripen into a right. In *La Frombois v. Jackson*, 8 Cow. 589, it was held not to be necessary that an adverse possession, in order to be available within the statute of limitations, should commence under an effectual deed; and that an executory contract, the consideration being paid, is a sufficient basis of claim under color of title. In *Jackson v. Waters*, 12 Johns. 365, the court decided that a possession taken under a grant from the French-Canadian government, prior to the conquest of Canada by the British, of land now in the state of New York, was not such an adverse possession as would defeat the operation of a subsequent grant of the same land under the provincial government of New York. None of these cases hold that a sheriff's deed, following a sale under an invalid money judgment, cannot be made available as color of title. In the case at bar the questions of ouster and of adverse holding for five years after the ouster were questions of fact, and there was evidence at the trial in the court below to sustain the finding of the jury upon that issue.

4. We think the admission in evidence of the petition of Melville to set aside the judgment in *Cocke v. Melville*, and the order of the district court denying his motion, could not have injured the plaintiff. The court, at the trial of the present case, expressly instructed the jury that the judgment was *void*.

5. The deed from Cocke to Sanor was admissible. From a very early day it has been held here that a quitclaim deed is as effectual to transfer title as a grant, or bargain and sale. Such a deed, therefore, gives color of right.

6. The conveyance of March 19, 1862, from plaintiff to defendant of lands adjoining the demanded premises was, at most, irrelevant and immaterial. It could not have prejudiced the plaintiff.

7. The evidence of Sanor with respect to his having improved and inclosed the premises after the receipt of his deed from Cocke was admissible under the plea of the statute of limitations.

8. The court properly rejected evidence of declarations of Sanor, with respect to his title, made after he had sold and conveyed to defendant.

9. The court did not err in refusing to instruct the jury that one cannot hold possession of lands adversely, so as to acquire the title, unless he has knowledge of the nature of the title of the real owner.

10. It is contended by appellant, that, inasmuch as the title to the lands did not vest in the state until the certification by the land department in December, 1866, and as 10 years from that date had not lapsed when this action was brought, the *plaintiff* was not barred of a recovery. The certificate of purchase, under which plaintiff claims, was issued on the thirtieth day of August, 1858, under the act of April 21, 1858. By that act no certificate could issue until the whole purchase price of the land was paid, and the certificate in evidence herein recites that *Melville* had made payment in full. He thus acquired (at least, from the time the land was listed to the state) a perfect equity as against the state, and the case shows that no *patent* has been issued to him or his assignee. More than five years had elapsed after the land was certified to the state when this action was commenced. In *Manly v. Howlett*, 55 Cal. 94, it was said:

"It is true that before the patent should issue the statute of limitations might build up a title in the possessor, as between the parties, so as to determine their rights upon the *then* condition of things; but the issuance of the patent gave new rights; the patentee and his grantees then had a right superior to any theretofore owned or held by them, viz., the ownership of the land. They then had something which the state had not theretofore parted with. In a suit for the recovery of the land, commenced *after the issuance of the patent*, the statute of limitations cannot be held to have commenced running prior to the date of the patent."

Two circumstances existed, or were assumed to exist, in *Manly v. Howlett*, which do not appear in the case at bar: *First*. In that case it appeared that subsequent acts were to be performed by the party claiming under the certificate before he would be entitled to a patent, viz., payment of the annual interest, and of the deferred purchase money. In the case before us, full payment of the purchase money had been made to the state before the certificate issued. *Second*. In that case a patent had been issued to the assignee of the certificate, before the action was brought. In the case at bar, neither the origi-

nal holder of the certificate nor any assignee of his had received any further muniment of title when this suit was commenced.

As we have seen, when this action was commenced more than five years had elapsed after the certification of the land to the state. When the land was certified, the holder of the certificate of purchase, who had paid for the land, and fully complied with all the terms of his contract, became entitled absolutely to the patent. He became, as against the state, the owner of the land, at least equitably, and the state could not have recovered its possession. He acquired a perfect equity, and the act of 1858 clearly provides that when the land shall be certified to the state, the title thus acquired shall inure beneficially to the purchaser who has complied with the conditions imposed upon him; the state retaining, at most, but the naked legal title. Plaintiff, therefore, if he can be treated as the holder of the certificate, had a title with right of possession from December, 1866, of which his certificate was *prima facie* evidence, and of which his certificate, and the certification to the state, were conclusive evidence. His title, such as it was, gave him the right of possession, and it remained unchanged for more than five years prior to the commencement of the action. Even if it should be conceded that he may commence a new action within five years after he shall receive a patent for the land, he cannot recover, as against an adverse possessor, on a title acquired more than the statutory period before the present action was commenced.

11. It is said that the state is charged with a trust in respect to land of the swamp-land donation, and that, if the state may be disseized at any time before *reclamation*, the power to execute the trust is gone, for the subject of the trust is then under the absolute and exclusive dominion of the disseizor. It is not necessary to decide whether, if the state had not parted with its title, it could have been disseized of a portion of the swamp lands. Here, as we have seen, the right of possession had passed to the holder of the certificate of purchase, in whom had vested a perfect equity, with an absolute right to demand a patent. Appellant cites, in support of his position with respect to the trust, certain adjudications which, as we think, do not support it. *Emigrant Co. v. County of Adams*, 100 U. S. 61, rather upholds the view that the power of reclaiming swamp and overflowed lands is in the state, without any other security that such lands will be reclaimed, or that the proceeds of their sales will be applied to reclamation purposes, than such as rests upon the good faith of the state; that the state may employ its discretion in the disposition of the proceeds, and providing means for reclamation, without being called on to account, and without the title to the lands being affected, at least, at the option of any party other than the United States. It would follow from this, and from the wording of the act of congress of September 28, 1850, (9 St. 519,) that the state may dispose of the lands prior to their reclamation. There is no provision in the act of

the legislature of April 21, 1858, to the effect that such lands shall not be sold, or that no certificate of purchase or *patent* shall issue, until after the lands are reclaimed. The state of California has provided, by appropriate legislation, for the reclamation of swamp and overflowed lands after the title of the state thereto had passed to private persons.

Kimball v. Reclamation, etc. 45 Cal. 344, is authority to the point that one who accepts a grant from the state for swamp lands is presumed to accept with a consent that he and his land shall be subject to subsequent legislation imposing a burden on the lands to secure their reclamation. The case assumes that such lands may be conveyed prior to their reclamation, and that the state may discharge its duty, and comply with the condition subsequent imposed by the grant from the United States, by appropriate legislation, providing for reclaiming the lands *after* they have passed to private proprietorship. Appellant also cites *Hoadley v. San Francisco*, 50 Cal. 265. But in that case it was held that one cannot acquire a title by adverse possession to a public square or a public street—laid out and dedicated as such on *pueblo* lands within the limits of San Francisco—*because* the city had no power to alienate or in any manner dispose of such public squares or streets. With reference to the swamp and overflowed lands, the legislature of the state has power to grant them to private persons. As we have seen, the state had transferred the right of possession to the particular land herein sued for.

Judgment and order affirmed.

PACKARD v. MOSS. (No. 8,551.)

Filed September 11, 1884.

JUDGMENT AFFIRMED.

On authority of *Packard v. Johnson, ante*, 632, judgment and order affirmed.

Department 1. Appeal from the superior court of San Joaquin county.

J. B. Hall, for appellant.

J. H. Budd and *F. F. Baldwin*, for respondent.

By THE COURT. On the authority of *Packard v. Johnson*, No. 8,550, *ante*, 632, opinion this day filed, judgment and order affirmed.

65 Cal. 593

ESTATE OF BILLINGS. (No. 9,528.)

Filed September 15, 1884.

1. ALIENS—RIGHT OF SUCCESSION.

Under section 671, Civil Code, aliens, whether resident or non-resident, are entitled to take property in this state, either by descent or purchase.

2. CONSTITUTIONAL LAW—NON-RESIDENT ALIENS—SUCCESSION.

The sections of the Civil Code extending the right of inheritance to non-resident aliens, do not violate the constitution; nor is such legislation inhibited by the constitution.

Department 2. Appeal from the superior court of Sacramento county.

S. P. Scaniker and McKune & George, for L. N. Billings.

W. H. Beatty and S. C. Denson, for California State Bank.

Young, Young & Dunn, for L. J. Huntoon.

Isaac Joseph, for D. D. Billings.

THORNTON, J. E. L. Billings was a resident of the county of Sacramento, and died therein intestate, leaving real and personal property. The decedent left surviving him no wife, no descendants, and no father or mother. He left brothers and sisters, of whom, at the time of his death, Lewis N. Billings and Martha V. Clark were *bona fide* residents of this state, Daniel D. Billings, Nancy Victoria Martin, Elmira Tittmore, and Sylvina Hauver were residents of the dominion of Canada, and Miranda R. Tryon, Lucinda Smith, and Elsie Irish were residents of the state of Kansas. The estate being in such condition as to allow a particular distribution, all the sisters, (except Martha V. Clark,) and Daniel D. Billings, petitioned for such distribution, in view that the estate descended to all the brothers and sisters, (nine in number,) share and share alike. Louis N. Billings and the assignees of Martha V. Clark appeared, and the former claimed that he and his sister, Martha V. Clark, were each entitled to one-half of the estate of the deceased, to the exclusion of the other claimants. It appears that all the above-named brothers and sisters were natives of Canada, and, as it nowhere appears that they were naturalized, they must be held to be aliens at the time of the death of the decedent. The case was thus argued. The court below held that each of the claimants was entitled to one-ninth of the estate. From this decree Lewis N. Billings appeals.

The contention on the part of appellant is that the estate descended under the constitution and law of this state to himself and his sister, Martha V. Clark, each taking one-half, as they were, at the time of the death of deceased, though aliens, *bona fide* residents of the state of California; that the other claimants were aliens, who who never, prior to the death of E. L. Billings, were residents of this state, and therefore took no part of his estate.

The constitution of this state, by the seventeenth section of the first article, provides that foreigners of the white race, "eligible to become citizens of the United States under the naturalization laws thereof, while *bona fide* residents of this state, shall have the same rights in respect to the acquisition, possession, enjoyment, transmission, and inheritance of property as native-born citizens." The Civil Code contains the following provisions, which were in force when E. L. Billings died:

"Sec. 671. Any person, whether citizen or alien, may take, hold, or dispose of property within this state.

"Sec. 672. If a non-resident alien take by succession, he must appear and claim the property within five years from the time of succession, or be barred. The property in such cases is disposed of as provided in title 8, pt. 3, Code Civil Proc."

"Sec. 1404. Resident aliens may take in all cases by succession as citizens, and no person capable of succeeding under the provisions of this title is precluded from such succession by reason of the alienage of any relative; but no non-resident foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession."

The word "take," used in section 671, Civil Code, above quoted, is broad enough to include the taking by *descent* as well as by purchase, and, in our opinion, is used to indicate the taking or acquisition of property in either of the modes above mentioned. We see no reason to confine the meaning of "take," to acquisition by purchase. This taking of property is not confined to an alien residing in the state. Section 671 clearly extends this right to all aliens, whether resident or non-residents of the state. The section following, in our view, confirms the interpretation of section 671 given above. It speaks of a non-resident alien taking by succession, the equivalent of *descent*, as allowable by the laws of this state.

It is contended that, under the section of the constitution above quoted, the whole of the estate of the deceased vested in the heirs who were residents of the state at the time of his death, to the exclusion of those who were not then residing in the state. It is true that such would have been the effect of the constitutional provision had there been no legislation, operative at the time of the death of an intestate, extending the right of succession or inheritance to non-resident alien heirs. The constitution did not inhibit such legislation. It was so held in *People v. Rogers*, 13 Cal. 159, under the constitution of 1849, in which was a section (section 17, art. 1) similar, as far as this question is concerned, to the one referred to and quoted above from the present constitution. We see no violation of the constitution in the sections of the Civil Code above quoted, extending the right of inheritance to non-resident aliens.

The point urged on behalf of appellant—that the estate must be an escheated estate, or the non-resident alien cannot take at all—is clearly untenable. A mere perusal of the sections quoted from the

Civil Code, *supra*, and of the sections of the Code of Civil Procedure (1269-1272) referred to by counsel for appellant, will show this.

We find no error in the record. Judgment affirmed.

We concur: SHARPSTEIN, J.; MYRICK, J.

65 Cal. 600

THOMAS v. PLACERVILLE G. Q. MIN. CO. (No. 8,273.)

Filed September 17, 1884.

1. CHANGE OF VENUE—CONVENIENCE OF WITNESSES.

Neither a plaintiff nor a defendant can move for a change of the place of trial until after answer.

2. FOREIGN CORPORATIONS—RESIDENCE.

A foreign corporation has no local county residence in this state, where alone it can be sued. It is liable to be sued in any county in the state, subject to the right of such corporation to move for a change upon sufficient showing.

Department 1. Appeal from the superior court of the city and county of San Francisco.

H. A. Powell, for appellant.

H. E. Highton, for respondent.

McKINSTRY, J. Defendant, an English corporation, demurred to the complaint and moved for a change of the place of trial from San Francisco to El Dorado, on the grounds that defendant resided in the latter county, and that the convenience of witnesses and the ends of justice would be promoted by the change. Neither a plaintiff nor a defendant can move for a change of the place of trial because of the convenience of witnesses until after answer. *Cook v. Pendergast*, 61 Cal. 79. Defendant has never designated a person upon whom service of process can be had. St. 1871-72, p. 826. The summons was properly served on one conceded to be defendant's "managing agent."

Has a foreign corporation doing business in this state a residence in any particular county, such as is contemplated by the provisions of the Code of Civil Procedure relating to the place of trial? No statute makes "the principal place of business" of either a domestic or foreign corporation its "residence" for the purpose of determining the county in which shall be had the trial of an action brought against it. In *Jenkins v. California Stage Co.* 22 Cal. 538, it was said:

"The modern decisions very generally concur in giving corporations a local existence, like persons. * * * Every corporation has some locality where its principal office or place of business is established, and it may properly be said to 'reside' at such locality," etc.

This language was *dictum*, but, giving it full force, it is applicable to the corporation then before the court,—a corporation organized un-

der the laws of this state. By an act then in force, persons forming a corporation in California were required to file in a public office a certificate stating the city or town and county "in which the principal place of business of the company is to be located." St. 1850, p. 365. And the Civil Code (290) requires articles of incorporation to be filed, setting forth the place where the principal business of the corporation is to be transacted. At the place named in the "articles" is the office of the corporation; its records are to be kept there; there are held the meetings of its directors and stockholders; from thence emanate directions for the conduct of its affairs. Certainly, a domestic corporation has no residence outside of the state, and it may be that such a corporation is estopped from asserting its residence to be in any other county than the county mentioned, or the county including the town or city mentioned in its articles. A California corporation, formed to work a mine in Nevada, has its locality and life in California. It may, by reason of an established comity, sue, and it may be sued, in Nevada but it does not *reside* there; unless a statutory residence has been given it by the legislature of that state. So, if the rule laid down in *Jenkins v. California Stage Co.* be upheld, a domestic corporation having its office, etc., in San Francisco resides in San Francisco, though its sole object be to work a mine in Tuolumne.

Whether the rule of *Jenkins v. California Stage Co.* is or is not the correct rule, as applied to corporations formed in this state, it is not applicable to corporations formed elsewhere. While domestic corporations exist and have their location within this state, foreign corporations have their legal existence and are located within the territory of the government that creates them. 2 Potter, Corp. § 611c. As domestic corporations do not reside in a foreign country, within the meaning of section 395 of the Code of Civil Procedure, so foreign corporations do not reside in this state, within the meaning of the same section. A foreign corporation cannot do business here without subjecting itself to the jurisdiction of our courts, but it is not a necessary corollary that it is entitled to claim a "residence" here. It cannot escape the consequences of an illegal act done by its agents, within the scope of the authority it has conferred upon them, by setting up an existence under a foreign government. *People v. Central R. Co.* 48 Barb. 503. It is liable to be sued here to the same extent as an individual or company incorporated under the laws of this state. *Austin v. N. Y. & E. R. Co.* 1 Dutch. 383. It may be sued here, not because it resides here, but because it has chosen to do business here by its agents. Its home is in the country where alone it has its being, As it resides, if anywhere, out of the state, an action against it may be tried in any county designated by the plaintiff. Code Civil Proc. 395. This, of course, subject to the right of the corporation defendant to move for a change upon sufficient showing.

To summarize: A foreign corporation exists in and by virtue of the law of a foreign country, and no statute of this state has ever given a local (county) residence to such a corporation, where alone it can be sued. Its liability to be sued in the courts of this state no more confers a county residence upon it than does the comity which permits it to apply to our courts for the enforcement of a contract or the redress of a wrong.

Order affirmed.

We concur: ROSS, J.; MCKEE, J.

65 Cal. 605

RUSSELL v. BROSSÉAU and another. (No. 8,847.)

Filed September 17, 1884.

1. LOST WRITING—EVIDENCE OF CONTENTS—DECLARATIONS.

A witness who can neither read nor write cannot testify to the contents of a written instrument, and his evidence as to declarations by another of its contents is mere hearsay.

2. MINING CLAIM.

Failure to perform the amount of work required to be done annually on a mining claim renders it open to subsequent location, provided the original locators have not, before such relocation, resumed their work upon the claim.

Department 1. Appeal from the superior court of the city and county of San Francisco.

P. Van Clief, for appellant.

C. W. Cross and *F. D. Soward*, for respondent.

MORRISON, C. J. In the opening brief of appellants may be found the following correct statement of the case we are considering:

"This action was brought under section 738, Code Civil Proc., to determine the adverse claim of appellants to one undivided half of a mining claim called the 'Gray Eagle Claim,' and five-eighths ($\frac{5}{8}$) another claim called the 'Paris Mountain Claim,' adjoining the 'Gray Eagle Claim.'

"In his complaint the respondent (plaintiff in the court below) alleged that he was the owner of and in possession of said undivided parts of said mining claims, and 'that the defendants, and each of them, claim an estate or interest in the *same* undivided one-half of said Gray Eagle mining claim, owned and possessed by plaintiff as aforesaid, and also in the *same* undivided five-eighths of said Paris Mountain Company's mining ground, owned and possessed by plaintiff as aforesaid,' and 'that the said claim of defendants, and each of them, is adverse to plaintiff's estate therein, and is without any right whatever, and that said defendants have no estate, right, title, or interest whatever therein.' By an amendment to his complaint, the plaintiff alleged, in effect, that defendants were estopped from denying plaintiff's alleged title to said one-half of the 'Gray Eagle Claim' by a former judgment of the same court, in which Peter Russell and others were plaintiffs and Brosseau and Joubert were defendants, rendered June 15, 1881, said former action being of the same nature as this, to determine the adverse claim of defendants to the *same* undivided half of the Gray Eagle claim.

"The answer for the defendants denies that plaintiff ever had any title to, or possession of, any portion of the mining ground described in his complaint; admits a former judgment in favor of plaintiff for one-half of the Gray Eagle claim, rendered on the third day of June, 1881, but *not later*; alleges that plaintiff lost and forfeited any right he ever had in or to said mining claim by failure to comply with the local miners' laws; and further alleges that defendants lawfully located and appropriated all the mining ground in dispute on the tenth day of June, 1881, the same then being unoccupied mineral land of the United States, subject to such location. The case was tried by the court without a jury. The findings and judgment were in favor of plaintiff for all he demanded in his complaint. The defendants moved for a new trial on a statement of the case. The motion for a new trial was denied, and the appeal is from the order denying a new trial and from the final judgment. Both parties concede that the land in dispute is public mineral land of the class known as placers. Plaintiff claims solely by purchases, and does not pretend to have located any part of the land in dispute."

The first point made by appellants that we will notice is that the court erred in overruling an objection made by defendants' counsel to a question asked plaintiff as to what one Tom Jones told him were the contents of a certain paper posted on the Gray Eagle claims. The notice in question was a notice of location of the claims, and was indispensable to the plaintiff's cause of action. Objection was made to the plaintiff testifying as to what said notice contained, because he had already testified that he could *neither read nor write*. On this point there was no controversy, and how a witness who could neither read nor write could testify to the contents of a written instrument we are at a loss to understand.

It is claimed that the matter was merely a part of the *res gestæ*; but we do not so regard it. It was the *main fact* in the case, and not circumstantial to the principal fact, as the *res gestæ* always is. "It is only when the thing done is equivocal, and it is necessary to render its meaning clear, and expressive of a motive or object, that it is competent to prove declarations accompanying it as falling within the class of *res gestæ*." 1 Greenl. Ev. § 108, and note. The plaintiff was permitted to testify, against defendants' objection, to statements or declarations of Tom Jones, made to him (plaintiff) as to the contents of the notice, and this came clearly within the rule prohibiting hearsay evidence.

The second point, that any title plaintiff or his grantors ever had under locations made by them in 1858 and 1859 of the Gray Eagle and Paris Mountain claims was forfeited for a failure to make the renewals required by the mining laws of the district, it is unnecessary for us to consider, as there is another point in the case which we deem fatal to the plaintiff's right to a recovery, under the evidence in the case now before us. The rule did not declare an absolute forfeiture for a failure to comply with the mining rule providing for a renewal; and, in view of the decision in the case of *Bell v. Bed-rock T. & M. Co.* 36 Cal. 219, it is claimed in this case that the failure to comply with the rule or regulation requiring renewals semi-annually did not

work a forfeiture. But it is further claimed that there was a failure on the part of plaintiff and his grantors to comply with the provisions of the act of congress governing the possession and continued ownership of mining claims, and that such failure left the claims in controversy open to relocation.

By section 2324, Rev. St. U. S., it is provided as follows:

"On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein, until a patent has been issued therefor. * * * And upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made: provided, that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

In the very recent case of *Du Prat v. James*, 4 PAC. REP. 562, this court had the foregoing act of congress before it, and we concur in the views therein expressed as to its effect and operation. The work in the act prescribed must be done, or the claim is open to location in the same manner as if never located at all, unless work is resumed before the second location is made. The conditions imposed by the act of congress are wise and salutary, and are by no means onerous. It is our duty to hold the locators of mining claims bound by them. See *Carney v. Arizona Mining Co.* 2 PAC. REP. 734.

In the present case it is not pretended that the act of congress was complied with. Indeed, the evidence fails to show that either plaintiff or his grantors did any work on the claims in controversy for years. If they ever did make a valid location of the claims, they failed to perform (so far as the evidence shows) the amount of labor required to be done annually to protect them against subsequent location; and the court finds, as a fact in the case,—

"That the defendants Brosseau and Joubert, both citizens of the United States, on the tenth day of June, 1881, entered upon and attempted to locate the land included in the said Gray Eagle and Paris Mountain Companies' ground for mining purposes. Said attempted location was made in accordance with the laws of congress, the local laws, rules, customs, and regulations of miners, governing miners' locations, in force in said Depot Hill mining district at the time of said attempted location; and there was no defect in said attempted location of said defendants, except that the land included in said last-named claims was not at that time unoccupied, and was not then subject to location, but was then, and for a long time prior thereto had been, in the possession and under the control of plaintiff."

It is not pretended and cannot be claimed, in face of the evidence in this case, that plaintiff had an actual *pedis possessio*, such as would, under any circumstances, bring him within the rule laid down by this court in the case of *Funk v. Sterrett*, 59 Cal. 613. The only

claim or pretense of claim was that plaintiff's grantors had located the mining ground in 1858 and 1859 by marking out and establishing the boundaries thereof.

The judgment pleaded and introduced in evidence could not have any effect on the title subsequently acquired by the defendants. On the evidence now before us the defendants were entitled to a judgment; but there may be facts in the case which were not before the court, and under the circumstances it is proper to reverse the judgment and order, and remand the case for a new trial. It is so ordered.

We concur: MCKINSTRY, J.; SHARPSTEIN, J.; MCKEE, J.; MYRICK, J.; ROSS, J.

(65 Cal. 603)

FREEHILL v. PORTER, Treasurer, etc. (No. 8,438.)

Filed September 17, 1884.

1. STATUTE OF LIMITATIONS—SACRAMENTO CITY BONDS.

The right to maintain an action on Sacramento bond coupons, under the act of April 24, 1858, does not accrue until the money for the payment of the same is in the city treasury, and the statute of limitations does not commence to run until that time.

2. SACRAMENTO BOND COUPONS—PRESENTATION TO BOARD OF TRUSTEES FOR ALLOWANCE.

As these coupons were established as debts to be paid, by the statute under which they were issued, it was not necessary to present them to the board of trustees or auditor for allowance, and they, therefore, had no authority either to reject them or prevent their payment.

In bank. Application for writ of *mandamus*.

J. F. Cowdery, I. S. Belcher, and W. C. Belcher, for petitioner.

A. C. Freeman and A. P. Catlin, for respondent.

MYRICK, J. *Mandamus*, to compel the treasurer to pay certain coupons, being for interest on bonds. The bonds were issued under authority of the act of the legislature of April 24, 1858. St. 1858, p. 280, § 37. According to section 35 of that act, 55 per cent. of certain revenues therein named were set apart and appropriated to the payment of the annual interest and final redemption of the bonds. The bonds were issued by the city and received by the holders on the faith thus pledged for the payment of interest and for redemption. It became the duty of the treasurer to pay the coupons as fast as moneys came to the treasury under this act; and it was not competent for the board of trustees created by the act of April 25, 1863, (St. 1863, p. 415,) to divert the moneys into other channels, to the detriment of bondholders.

It is urged that, as the coupons in question matured, according to their face, on the first of January, 1872, the statute of limitations

bars any proceeding on the part of petitioner to enforce payment; that if the proper amount of taxes were not levied in any one year, such levy should have been compelled by *mandamus*; that if any step necessary to have the proper funds in the treasury had been omitted, a proceeding to compel such step was the proper course. We do not understand this to be the law as applicable to this case. According to the act of April 25, 1863, *supra*, no action could be maintained against the city on these bonds or coupons. By law, it was the duty of the city to make provision for the payment of the bonds and coupons, according to the statute under which they were issued, and, by omitting to perform such duty, the city could not create the defense of the statute of limitations. Not until the funds were in the treasury, properly applicable, would the statute begin to run; not until that period would the petitioner have any right of action or proceeding against the treasurer. The contrary view would place it in the power of a municipality, in many cases, to avoid all payment of its debts, because, if by concert of action each officer should omit to perform his duty, the time consumed in compelling each to perform such duty might be made to consume all the period of the statute before the funds would reach the treasury. We do not think the legislature intended such result. It was not necessary that these coupons should have been presented to or allowed by the auditor and board of trustees; they did not constitute demands within the meaning of sections 9 and 10 of the act of April 25, 1863. Neither the auditor nor the board of trustees had any discretion or authority to reject them, or prevent their payment; the statute under which they were issued established them as debts to be paid.

Let the writ issue as prayed for.

We concur: MORRISON, C. J.; MCKINSTRY, J.; ROSS, J.; THORNTON, J.; SHARPSTEIN, J.

DAVIS v. PORTER. (No. 8,817.)

Filed September 17, 1884.

MANDAMUS—WRIT ISSUED.

On the authority of *Freehill v. Porter*, ante, 646, writ of *mandamus* issued.

In bank. Application for writ of *mandamus*. The facts and points involved in this case were similar to those in the case of *Freehill v. Porter*, ante, 646.

J. F. Cowdery, I. S. Belcher, and W. C. Belcher, for petitioner.

A. C. Freeman and A. P. Catlin, for respondent.

By THE COURT. On the authority of *Freehill v. Porter*, No. 8,438, ante, 646, opinion this day filed, let the writ issue as prayed for.

65 Cal. 609

Ex parte HEILBRON. (No. 20,014.)

Filed September 17, 1884.

SLAUGHTERING ANIMALS—SACRAMENTO CITY ORDINANCE.

The board of trustees of Sacramento have power under the statute to control slaughtering, and to regulate slaughter-houses, and may prevent the slaughtering of animals within the city limits.

Department 2. Application for writ of *habeas corpus*.

Hart & White, for petitioner.

W. A. Anderson and Grove L. Johnson, *contra*.

By THE COURT. The petitioners were arrested upon a charge of violating an ordinance of the city of Sacramento, passed June 27, 1872, which declares it to be unlawful "for any person to slaughter any animal within the city, or to erect, maintain, or use, or cause to be erected, maintained, or used, within the city, any house, shed, or other building as a slaughter-house, or to dress or clean any slaughtered animal within the city." The act of the legislature of the state incorporating the city, approved April 25, 1863, gave power to the board of trustees to make ordinances to control and regulate slaughter-houses, or provide for their exclusion from the city limits, or any part thereof. Article 1, § 2.

It is not necessary to enter upon a lengthy consideration of the points presented on behalf of the petitioners as against the validity and constitutionality of the ordinance; it is sufficient to say that the points presented have been considered and adjudicated adversely to the petitioners by this court in *Ex parte Shrader*, 33 Cal. 279; and the power of a municipal corporation, under a charter similar to the one above referred to, to make and enforce ordinances regulating certain avocations recognized in *Johnson v. Simonton*, 43 Cal. 242; *Ex parte Smith*, 38 Cal. 702; and *Ex parte Casinello*, 62 Cal. 538.

"Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam-power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought to so use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community." 2 Kent, Comm. 340. "If a landlord could let his building for a small-pox hospital, or a slaughter-house, he might obtain an increased rent; but he is restrained, not because the public have occasion to make the like use, or to make any use, of the property, or to take any benefit or profit to themselves from it, but because it would be a noxious use, contrary to the maxim, *sic utere tuo ut alienum non ledas*." *Com. v. Alger*, 7 Cush. 86.

In the opinion of Justice MILLER, speaking for the court, in the

Slaughter-house Cases, after defining the "police power," the following language is used, viz.:

"The regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this power." 16 Wall. 63. See, also, 1 Dill. Mun. Corp. § 93.

The conclusion reached by us is not in conflict with the cases cited on behalf of petitioners. The petitioners are remanded.

65 Cal. 613

PEOPLE v. LE ROY. (No. 10,948.)

Filed September 18, 1884.

1. EVIDENCE—"CONFESSION" DEFINED.

A confession is a person's admission or declaration of his agency or participation in a crime, and is restricted to acknowledgments of guilt.

2. SAME—VOLUNTARY STATEMENTS OF PRISONER.

Proof of admissions by a prisoner, which, though they themselves do not involve his guilt, tend in connection with other facts to prove it, is competent, even without preliminary proof that they were voluntarily made.

3. SAME—REFRESHING MEMORY.

Written *memoranda* may be referred to by a witness for the purpose of refreshing his memory as to statements made by a prisoner, which statements witness wrote at the time they were made.

4. SWEARING TO COMPLAINT.

A justice of the peace is authorized to administer and certify to the oath of a complainant in a criminal prosecution.

5. INFORMATION—FICTITIOUS NAMES—CORRECTION OF.

That a defendant is charged in an information by other names than his true name, is not ground for setting aside the information. As soon as his correct name is ascertained the same must be inserted and continued in subsequent proceedings.

Department 1. Appeal from the superior court of the city and county of San Francisco.

John. D. Whaley, for appellant.

Atty. Gen. Marshall, for respondent.

Ross, J. The defendant, who was convicted of the crime of murder in the first degree and adjudged to suffer death, brings this appeal from the judgment, and from an order refusing him a new trial. The points he makes we have considered with care, but find in them no valid reason to disturb the judgment. The point most relied on by counsel is that the court below erroneously admitted in evidence certain statements made by defendant to the witness Lees. It is claimed that those statements were not voluntarily made, but were extorted from defendant by means of threats and promises. It is true that defendant so testified at the trial, but the testimony on the part of the prosecution was to the effect that the statements were

not induced by any threats or promises, but were made freely and voluntarily. However this may be, it is a sufficient answer to the point to say that the statements made by defendant, concerning which the witness for the prosecution was permitted to testify, did not constitute a "confession" admissible only after proof that it was made voluntarily. A confession is a person's declaration of his agency or participation in a crime. The term is restricted to acknowledgments of guilt. *People v. Parton*, 49 Cal. 637; *People v. Strong*, 30 Cal. 157; 1 Greenl. § 170. The statements of defendant given in evidence were not acknowledgments of his guilt; on the contrary, in his statements he all the time denied his guilt. The matters admitted by him, however, while not in themselves involving his guilt, did, when connected with other facts, tend to prove it; but proof of such admissions is competent. Said this court, in *People v. Parton*, *supra*: "An admission of a fact not in itself involving criminal intent is not to be rejected as evidence (without the preliminary proof) merely because it may, when connected with other facts, tend to establish guilt."

There was no error in permitting the witness Lees, in testifying to the statements made by defendant, to refresh his memory from written memoranda made by him at the time the statements were made. *People v. Cotta*, 49 Cal. 170.

Nor did the court below err in denying defendant's motion to set aside the information. There are but two statutory grounds for a motion of that character: The *first* is that before the filing of the information the defendant was not legally committed by a magistrate; and the *second*, that the information is not subscribed by the district attorney of the county. Penal Code, § 995. The motion in the present case was made on the first of these grounds, and it is contended that it should have been granted, because the complaint filed in the police court was sworn to before a justice of the peace, and not before the police judge of the city and county of San Francisco. There is nothing in the point. The justice of the peace was authorized by law to administer and certify to the oath of the complainant. Penal Code, §§ 806, 1426; Code Crim. Proc. §§ 177, 179. The fact that in the information the defendant was designated by different names was not a ground for setting aside the information. Section 995, *supra*. From the record it appears that when, on the fifteenth of September, 1883, defendant was arraigned, he answered that his true name was William Le Roy, but when, on the first of October, 1883, the case came up for trial, he answered that his true name was Wright Le Roy. The latter name was thereupon inserted and continued in the subsequent proceedings, in accordance with the provision of section 953 of the Penal Code, which reads: "When a defendant is charged by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered, it must be inserted in the subsequent proceedings, referring to the fact of his be-

ing charged by the name mentioned in the indictment or information."

It is claimed for the appellant that there was an inconsistency in the charge of the court with respect to circumstantial evidence, but an attentive reading of the charge fails to disclose to us any such inconsistency. The jury was fairly and fully instructed on the point. There was ample evidence to justify the verdict.

Judgment and order affirmed.

We concur: MCKINSTRY, J.; MCKEE, J.

65 Cal. 611

ROBINETT v. McDONALD. (No. 8,291.)

Filed September 18, 1884.

LIBEL—PLEADING—VARIANCE—PARTIES.

In an action for libel, proof that words of a libelous nature were published, but of the complainant and another person, is not a variance, fatal to the action; when the injury is several, each person injured must sue alone.

Department 1. Appeal from the superior court of the city and county of San Francisco.

G. D. Shadburne, for appellant.

Bishop & Fifield, for respondents.

BY THE COURT. The court below granted a nonsuit. It is urged by respondents that the order was proper because the libel alleged in the complaint was not proved, but another and distinct libel, consisting of words published concerning plaintiff and another person—Robinett and Kernan. No question of *partnership* is presented by the record. If plaintiff's name was annexed to the publication, so as to make the alleged libel applicable to him, it is immaterial that other names were also annexed to the libelous words, even though one of them was connected by the copulative "and" with the name of plaintiff. It is not a fatal variance when the words alleged in an action brought by A. are, "A. committed forgery," and the proof, "A. and B. committed forgery." *Nichols v. Hayes*, 13 Conn. 155. Plaintiff here proved substantially the words alleged by proving words including the words alleged, the latter constituting a libel. The proof of words in addition to the words alleged does not constitute a material variance, unless, at least, the additional words take away, detract from, or modify the legal effect of the words alleged. The rule is that when the injury is several, each person injured must sue alone. Townsh. Sland. & Lib. § 303, and note.

Respondents further contend that plaintiff introduced no evidence to support the averments of the complaint: (1) That certain of the

defendants composed partnerships; or (2) that defendants, as individuals or firms, composed the "Millmen's Protective Association of the Pacific;" or (3) that such association was not an incorporation, as alleged in the complaint; or, (4) that the association had any connection with or caused the publication to be made. There was no such evidence.

Respondents further contend there was no evidence to show that defendants, or any of them, had any connection with or caused said publication to be made. The complaint avers:

"That at all of said dates said defendants, under the name of the 'Millmen's Protective Association of the Pacific,' published, or caused to be published and conducted, at the city and county of San Francisco, state of California, a quarterly printed publication, known as the *Revised Black List of the Millmen's Protective Association of the Pacific*. * * * That for the quarter of the year ending May, 1877, said *defendants published* in said *Black List* the following words of and concerning plaintiff, viz.:" etc.

There was some evidence tending to prove admissions of defendant Asa R. Wells, showing that he had connection with, and, with others, caused the publication to be made.

The judgment is reversed, in so far as it is a judgment in favor of defendant Asa R. Wells, and is in other respects affirmed. The order denying a new trial as to all the defendants, except the defendant Asa R. Wells, is affirmed. As to the defendant Asa R. Wells, the order denying a new trial is reversed, and the cause is remanded for a retrial of all the issues as between the plaintiff and the said Asa R. Wells.

SUPREME COURT OF CALIFORNIA.

2 Cal. Unrep. 373

HART v. WESTERN UNION TELEGRAPH CO. (No. 9,089.)

Filed September 18, 1884.

1. TELEGRAPH COMPANIES—LIMITATION OF LIABILITY.

A stipulation purporting to exempt a telegraph corporation from all liability for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same, is void for want of consideration to support it.

2. SAME—NEGLIGENCE—PRESUMPTION.

It is not competent for telegraph companies to stipulate against or limit their liability for mistakes happening in consequence of their own fault; such as want of proper skill or ordinary care on the part of their operators, or the use of defective instruments. They are exempt only for errors arising from causes beyond their control; and whether such error was caused by negligence, or was beyond their control, is a question for the jury, the presumption being that it occurred through negligence.

Department 1. Appeal from the superior court of San Joaquin county.

W. H. L. Barnes, for appellant.

Byers & Elliot, for respondent.

Ross, J. On the fifteenth day of December, 1882, the plaintiff delivered to the defendant, at its Stockton office, this message: "*George W. McNear, San Francisco: Buy bail barley falun; report by mail. GEORGE HART.*" The message was promptly transmitted and delivered as written, except that the word "bail" was changed to the word "bain." By the private cipher code of McNear, used by the plaintiff in the message, the word "bail" means "one hundred tons," and the word "bain" means "two hundred and twenty-five tons." As the message was delivered, it directed McNear to buy for the account of the plaintiff 225 tons of barley, whereas, as it was written by the plaintiff, McNear was directed to buy on plaintiff's account 100 tons only. Acting on the message received, McNear bought for plaintiff 200 tons of barley. When the plaintiff discovered that fact he notified the defendant that 100 tons had been bought in excess of that directed to be bought by the original message, and asked the defendant what he should do with the surplus so purchased? Defendant refused to give any instruction in regard to it. Plaintiff thereupon sold the barley at the highest market rate, his loss on the extra 100 tons being \$429.82. It is for the loss thus sustained by him that the action is brought.

At the trial, the only proof given by the plaintiff to show negligence on the part of the defendant was the admitted fact that the message was delivered in its altered form. It was also admitted that the mes-

sage was written by the plaintiff upon a printed form prepared by the defendant, underneath the words, "Send the following message, subject to the above terms, which are hereby agreed to;" and that among the "above terms" referred to are the following:

"To guard against mistakes or delays the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruptions in the working of its lines, or for errors in cipher or obscure messages."

That the message in question was not "repeated" is conceded by the plaintiff. It further appears in the case that no explanation of the meaning of the dispatch was made by the plaintiff at the time he delivered it to the defendant, for which reason, and because, as is claimed, the message under consideration was in cipher, appellant contends that the measure of damages is the price paid for the transmission of the telegram in this case—30 cents. In support of this point it is said by counsel that "the decisions of all the courts uniformly declare that unless the importance of the message is shown, either by its own terms or by explanation made to the person receiving it in behalf of the telegraph company, no damages are recoverable for failure or delay in transmission beyond the price paid for that purpose." In this appellant's counsel is mistaken. The cases cited by him undoubtedly sustain the point he makes, and there are other cases to the same effect. Some of those decisions were based on messages which were in cipher; and others, messages which, though not in cipher, did not themselves disclose the extent or import of any transaction had in contemplation by the parties. In those cases substantial damages were refused because neither the messages nor other information given made known to the operator what was contemplated. Hence it was ruled that plaintiff could not recover of the telegraph company what, not understanding, it could not have contemplated as the effect of a miscarriage or other failure.

While not doubting the general rule that damages must be such as may be fairly supposed to have entered into the contemplation of the parties when they made the contract,—that is, such as might be naturally expected to follow its violation,—we do question, and think not sound, the *application* of that rule as made in the class of cases to which allusion is above made. Telegraph companies have conferred upon them by law certain privileges, among them the right of eminent domain, and they are charged with certain duties; among them, the obligation to send promptly and correctly such messages as

are intrusted to them. Of course, if illegibly written, the operator may reject a message; but, if plainly written, his duty is to send it as written. Why has he the right to know what the message refers to? In what way would such knowledge aid him in the discharge of his duty to send it correctly? "One of the great attractions," says Scott and Jarnagin, in their treatise on the Law of Telegraphs, § 404, "which this mode of communication presents, is the brevity of the dispatch, such abbreviations being used in many cases as will enable the person for whom it is intended alone to understand it, and hence the vast amount of business the telegraph operator is capable of transacting in the transmission and delivery of messages. So that an explanation of the meaning, importance, and bearing of each message would be an insufferable annoyance, and, in the multiplicity of messages delivered for transmission, could not be remembered, even if the time could be spared to listen to it, and it would rarely afford any benefit or advantage to the company after the information was communicated." Proceeding, these writers say, and say correctly, that though the company, through its agents, may not know the meaning of the particular message, they do know that messages of great value and importance, involving heavy losses in case of failure or delay, or mistake in their transmission, are constantly sent over their wires; and they do know that they hold themselves out to the public as prepared at all times, and for all persons, to transmit messages of this description. And the rule of damages as applied to telegraph companies is there deduced, which we think the true rule, namely, that, although the message be unintelligible to the company, yet, as its undertaking was to transmit the message promptly and correctly, both parties contemplated that whatever loss should naturally, and in the usual course of things, follow a violation of that obligation, the company should be responsible for. The same conclusion was reached by the supreme court of Alabama in the case entitled *Doughtry v. Amer. U. Tel. Co.*, decided in December, 1883, a note of which will be found at page 731, 46 Amer. Rep., and by the court of appeals of Virginia in the case of *W. U. Tel. Co. v. Reynolds*, 77 Va. 173. See, also, *Rittenhouse v. Independent Line of Telegraph*, 1 Daly, 474.

It is also contended on behalf of the defendant corporation that, as the message in question was not "repeated," defendant is not responsible, under any circumstances, beyond the amount received for its transmission; and this because it is so declared in the conditions printed at the head of the form upon which the dispatch was written, and to which, as is claimed, the plaintiff assented. There are numerous cases that hold that such a rule on the part of the company is reasonable, valid, and binding on the sender of the message. The cases that so hold are too numerous to be here referred to in detail. They will be found collated in a note to the case of *W. U. Tel. Co. v. Blanchard*, 45 Amer. Rep. 486. But there are many cases

to the contrary, and the latter class we think based on the better reason. In the first place, we agree with the supreme court of Illinois in the case of *Tyler v. W. U. Tel. Co.* 60 Ill. 421, and S. C. 74 Ill. 170, where it is held that the regulation requiring messages to be repeated is not a contract binding in law, for the reason that the law imposed upon the company duties to be performed, for the performance of which it was entitled to a compensation fixed by itself, and which the sender had no choice but to pay; that among those duties was that of transmitting messages correctly; that the tariff paid was the consideration for the performance of this duty in each particular case, and when the charges were paid the duty of the company began, and there was, therefore, no consideration for the supposed contract requiring the sender to repeat the message at an additional cost of 50 per cent. of the original charge. To the same effect is *Bartlett v. W. U. Tel. Co.* 62 Me. 218, and *Candee v. W. U. Tel. Co.* 34 Wis. 477, where the court say:

"Aside from the objections resting on grounds of public policy, and which forbid the company from stipulating for immunity from the consequences of its own wrongful acts, it seems very clear to us that there can be no consideration for such stipulation on the part of the sender of the message, and that, so far as he is concerned, it is void for that reason, although exacted by the company and fully assented to by him. Either the company enters into a contract with him, and takes upon itself the burden of some sort of legal obligation to send the message, or it does not. It would be manifestly against reason, and what all must assume to be the intention of the parties, to say that no contract whatever is made between them, and nobody, not even the officers or representatives of the company, asserts such a doctrine. It would seem utterly absurd to assert it. Holding itself out as ready and willing and able to perform the service for whosoever comes and pays the consideration itself had fixed and declared to be sufficient, and actually receiving such consideration, it cannot be denied, we think, that a legal obligation arises and duty exists on the part of the company to transmit the message with reasonable care and diligence, according to the request of the sender. Such being the attitude of the company, and the obligation which it assumes by accepting the payment, the question arising is whether it can at the same time, and as a part of the very act of creating the obligation, exact and receive from the other party to the contract a release from it? The regulations under consideration, if looked upon as reasonable and valid, completely nullify the contract by absolving the company from all obligation to perform it, and the party delivering the message gets nothing in return for the price of transmission paid by him. Is it possible for the company, or for any other party entering into a contract for a valuable consideration received, to promise and not to promise, or to create and not to create, an obligation or duty at one and the same moment and by one and the same act? The inconsistency and impossibility of such things are obvious. But if there were no such difficulties, or if the occasion or circumstances were such that a valid release might be executed, and it be regarded in that light, still the objection exists that there is no consideration whatever to support it, and it must be held void on that ground. If it be urged that the sender receives his consideration in the reduced price of transmission, or because the company undertakes to send the message at one-half the usual rates of transmitting day messages, that argument ends in proving that the company does not undertake to send the message at all, and that no contract or agreement on its

part is made or entered into for that purpose. If the company promises or binds itself at all for the rate or consideration named, and which it is willing to and does accept, then the smallness of such consideration cannot operate to relieve from the promise or to destroy the obligation thus created. Regarding the regulations in this light, therefore, as well as in that of correct public policy, it is seen that effect cannot be given to them as a means of protection or escape on the part of the company from all liability for the performance of its contract. The regulations cannot serve to shield the company from the consequences resulting from the gross negligence or fraud of its officers or agents, or from their entire failure to perform the service, no good excuse for such failure being offered or shown."

We therefore hold that the stipulation purporting to exempt the corporation defendant from all liability for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same, is void for want of a consideration to support it. And further, that it is not competent for telegraph companies to stipulate against or limit their liability for mistakes happening in consequence of their own fault, such as want of proper skill or ordinary care on the part of their operators, or the use of defective instruments. See authorities above cited, and *Sweatland v. Ill. & Miss. Tel. Co.* 27 Iowa, 433; *Wolf v. Western Union Tel. Co.* 62 Pa. St. 83; *Breese v. U. S. T. Co.* 48 N. Y. 132; *U. S. Tel. Co. v. Gildersleeve*, 29 Md. 232; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; *Hibbard v. Western Union Tel. Co.* 33 Wis. 558; *Tel. Co. v. Griswold*, 37 Ohio St. 301. We think the true rule is that such companies are exempt only for errors arising from causes beyond their own control. And this would seem to be the rule adopted by statute in this state; for by section 2162 of the Civil Code it is declared: "A carrier of messages for reward must use great care and diligence in the transmission and delivery of messages. *A carrier by telegraph must use the utmost diligence therein.*"

We are further of opinion that, the plaintiff having proved the mistake in the message as delivered, the *onus* was upon the defendant to show how it occurred. *Tyler v. W. U. Tel. Co., supra.* If the error was caused by atmospheric disturbances, or a momentary displacement of the wires, the defendant knew it, and ought to show it. This, defendant undertook to do on the trial in the court below. There was testimony given tending to show that before and at the time the message in question was sent, trouble was experienced in the transmission of dispatches, owing to the condition of the weather; that it was foggy and stormy. It was further made to appear that in the telegraphic code the following lines and dots, when transmitted along the wire, made the word "bail:"

— . . . — — — — —
And that the word "bain" is expressed by the following:

— . . . — — — — —
There was also testimony tending to show that the operators at

Stockton and San Francisco were competent, and that the one at San Francisco was especially careful in the matter of this dispatch. The latter testified that she took particular pains with the message in question, "as is shown by the mark under one of the cipher words,—the last word,—because it was an unusual word—'falun.' I asked Mr. Dixon to repeat it, and I put a little mark, '+,' under it to show that it was repeated. The other words, being ordinary words, I paid no attention to, because it is something very likely to be received in any message." There was also given on behalf of the defendant further testimony tending to show that the error resulting in the change of the word "bail" to "bain" was caused by a break in the electric current, and that this in turn was caused by atmospheric influences prevailing at the time, and, of course, beyond the control of defendant. If such was the fact, the verdict should have been for the defendant. But it was a question of fact for the jury, under appropriate instructions from the court. The court should have told the jury that the mistake in the message as delivered, being admitted, the presumption was that it occurred through the negligence of defendant; but that if they believed from the evidence that the mistake occurred through a cause or causes beyond defendant's control, such as a break in the electric current, produced by atmospheric influences, their verdict should be for the defendant. We think this question, which was the turning one in the case, was not fairly submitted to the jury in the court below, and we must therefore remand the cause for a new trial.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MCKINSTRY, J.; MCKEE, J.

65 Cal. 616

STEIN *v.* HOWARD. (No. 9,551.)

Filed September 23, 1884.

CORPORATIONS—CAPITAL STOCK—FICTITIOUS ISSUE.

An increase of the capital stock of the Spring Valley Water Company, and sale of the same at the actual market value, for the purpose of enlarging the works and capacity, and supplying an increased quantity of water, is legitimate, authorized, and not a "fictitious" issue, within the meaning of the constitution, art. 12, § 11.

In bank. Appeal from the superior court of the city and county of San Francisco.

Rosenbaum & Sheeline, for appellant.

Fox & Kellogg, for respondents.

MYRICK, J. The complaint in this case was filed by a stockholder for the purpose of enjoining the trustees of the Spring Valley Water-

works, a corporation, from issuing and selling 20,000 shares of stock. The capital stock of the corporation was \$8,000,000, divided into 80,000 shares of the nominal value of \$100 each. At a meeting of the stockholders, duly called, held on the sixth of July, 1876, it was resolved (more than two-thirds of the capital stock being represented, and the vote being unanimous as to all present) that the capital stock be increased to \$16,000,000, to be divided into 160,000 shares of \$100 each. At a regular meeting of the board of trustees, held April 1, 1884, it was resolved by the board that the president and secretary be authorized to issue and sell 20,000 shares of the increased stock of the corporation at \$87.50 per share, the stockholders to be entitled to purchase one share of stock for every four shares which they then owned. The answer of the defendants averred that the corporation had already expended and paid out, in the construction of its works and in the purchase of property necessary therefor, a sum of money in excess of the \$8,000,000 for which certificates of stock had been issued, and of \$2,000,000 for which the proposed certificates were to be issued, and that the increase of the stock was *bona fide*, and for the purpose of selling the increased stock from time to time to raise funds for the purpose of extending and increasing the capacity of the works of the corporation; that for the protection of the property of the inhabitants of the city and county of San Francisco, and for supplying said inhabitants with abundance of water, it had become and was necessary that the property and capacity of the works of the corporation should be at once increased; and that the corporation had already entered into contracts involving the expenditure of more than half a million of dollars for the purchase of property necessary to the extension and increase, and that it was necessary to construct a new aqueduct and line of pipe for more than 25 miles; that the contemplated expenditure would amount to \$2,000,000; that for a long time past the stock of the corporation has fluctuated in the market, some days being as low as \$83, and other days as high as \$90, per share, and that on the said first day of April, 1884, the market value was \$87.50 per share, and no more; that the proposed sale of the increased stock was for the purpose of raising funds for the purposes aforesaid; and that the price named is the highest price which can be obtained.

The Civil Code of this state, section 359, makes provision for an increase of the capital stock of an incorporation. The constitution of this state contains the following prohibition in article 12, § 11: "No corporation shall issue stock or bonds except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void." The question for decision on this appeal is whether the stock proposed to be issued and sold will create a fictitious increase of stock. Webster's Dictionary defines the word "fictitious" to mean "feigned, imaginary, not real, counterfeit, false, not genuine." The circumstances under which the stock

is proposed to be issued and sold, as above stated, are: that the corporation has actual need of money for the purposes of its business; that the stock is proposed to be sold at the actual market value of the stock of the corporation; and to be sold only in such quantities as may produce the requisite funds. Under such circumstances, we think, it cannot be held that the issue is fictitious. Perhaps it might be asked, at what price should stock be offered for sale in order to make the issue fictitious? We apprehend that no direct and positive answer can be given. The constitution has given no definition of the word "fictitious;" it has not declared what was meant by the use of that word, further than what the word itself implies, taken in connection with the context. We apprehend that, in ascertaining the purport of the word, or rather its application, we must take into consideration the surrounding circumstances. Of the stock proposed to be issued, *there is no one share* upon which a person can place his finger and say that share is or will be feigned, imaginary, not real, counterfeit, false, not genuine. Each share is offered at a price equal to the price of any one of the old shares. So far from the new shares being fictitious as to the old shares, it may be that burdens which would otherwise rest on the old shares, to-wit, the payment of the corporation debts, will be entirely removed by the application of the funds realized or shared in *pro rata* by the new shares. We cannot say but that this removal of such burdens, or the sharing therein, will be of the value of the discount in the price at which the new shares are proposed to be sold, or increase the actual value of the old shares to their par value. It may very properly be said that the use of the word "fictitious" in the constitution, as above quoted, was as in contrast with the preceding sentence; as if to say that stock issued for money paid, labor done, or property actually received (price not named) is not fictitious. We do not think the issue or sale of the stock in question is within the prohibition of the constitution.

Order affirmed.

We concur: ROSS, J.; MORRISON, C. J.; SHARPSTEIN, J.; MCKINSTRY, J.

(65 Cal. 621)

PEOPLE v. SOTO. (No. 10,992.)

Filed September 24, 1884.-

1. JURY—DISCHARGE ON LEGAL HOLIDAY.

A jury may be discharged on a legal holiday under section 134, Code Civil Proc., and section 1142, Penal Code. Article 6 of section 5 of the constitution is not prohibitory of all business in the superior court on legal holidays, except the issuing of injunctions and writs, but only prohibits legislation establishing *terms* during which only judicial business can be transacted. The legislature is at liberty to allow or disallow the transaction of judicial business on holidays.

2. SAME—INSTRUCTIONS—ABSENCE OF DEFENDANT.

In a prosecution for murder it is not ground for a reversal that instructions were given to the jury in the absence of defendant, if, subsequently, the same instructions were repeated to them during his presence.

Department 1. Appeal from the superior court of Monterey county.

R. M. F. Soto, for appellant.

Atty. Gen. Marshall, for respondent.

McKINSTRY, J. To an information charging him with the crime of murder, defendant pleaded *not guilty* and *once in jeopardy*. The verdict was against him as to both pleas. At a former trial, the jury having been instructed on the twenty-first of February, 1884, the court became satisfied on the next day, the twenty-second of February, that there was no reasonable probability the jury could agree upon a verdict, and they were accordingly discharged. The twenty-second day of February was a holiday. Code Civil Proc. 10, 133, 134. A jury may be discharged on the twenty-second day of February, unless the constitution prohibits it. Code Civil Proc. 134; Penal Code, 1142. It is insisted by counsel for appellant that section 5 of article 6 of the constitution prohibits all business in the superior courts on a legal holiday or non-judicial day, except the issuing of injunctions and writs of prohibition. The section of the constitution does not, in terms, prohibit any legal business on holidays. The last clause expressly declares that injunctions and prohibitions may be issued on such days. The phrase "they"—the superior courts—"shall always be open (legal holidays and non-judicial days excepted)" is prohibitory of legislation establishing *terms of court* during which only judicial business can be transacted, but leaves the legislature at liberty to allow or disallow the transaction of all or any class of judicial business upon legal holidays. The jury were justified in finding against defendant upon his plea of former jeopardy.

After the jury had retired to deliberate upon their verdict they returned and asked for further instructions, and, defendant being absent, the court re-read to the jury a portion of the previously given written instructions. After the jury had again retired they were brought into court by order of the judge, who then directed them, in the presence of defendant, to disregard what he had read to them while defendant was absent, and proceeded to read again that which he had read when they came in the first time.

It is contended that the error of the court was not and could not be rendered innoxious by the repetition of the reading in the presence of the defendant. Why not? It may be conceded that it cannot be supposed the jurymen, in obedience to the admonition of the court, could entirely exclude from their minds the instructions given them while defendant was out of the court-room; but, inasmuch as it was their duty to bear in mind precisely the same instructions given while defendant was in the court-room, it is manifest no injury could

have been done defendant by reason of that which occurred while he was absent.

The judgment is sufficient in form. Judgment and order affirmed.

We concur: ROSS, J.; McKEE, J.

65 Cal. 619

YIK HON and others v. SPRING VALLEY WATER-WORKS. (No. 8,451.)

Filed September 24, 1884.

1. CONTRIBUTORY NEGLIGENCE—PLEADINGS.

Plaintiff in an action to recover damages for negligence is not required to aver that he was not guilty of contributory negligence.

2. SAME—INJURY BY WATER.

Where damage is caused by water falling on the roof of a building, the fact that the scuttles were open does not constitute contributory negligence.

3. SAME—VARIANCE.

Where the allegation is that goods were in a building, and the proof is that they were on the roof of a building, the variance is not material; it is sufficient that the goods were on the premises of plaintiff.

Department 1. Appeal from the superior court of the city and county of San Francisco.

Fox & Kellogg, for appellant.

T. D. Riordan and William Leviston, for respondent.

McKINSTRY, J. 1. Plaintiffs allege in their complaint that the water which escaped from defendant's main, by reason of the negligence of its servants, was cast and fell in great quantities on the roof of their house, and, thence descending to the floors below, destroyed their drugs, etc. Appellant, demurring to the complaint, contends that, as appears therein, the injury would not have occurred if the roof of plaintiff's house had been water-tight and the scuttles therein closed; that plaintiffs, therefore, were guilty of contributory negligence. Plaintiffs were not required to aver that they were *not* guilty of contributory negligence. *Robinson v. W. P. R. Co.* 47 Cal. 46. Nor does the allegation that the water passed through the roof, or through openings in the roof, establish that plaintiffs contributed to the injury. They had the right to use their own premises for any lawful purpose. If they had placed their goods in canvas tents, this would not have relieved defendant of the consequences of its wrongful act. There was no such relation between the omission to provide means by which water would be effectually excluded from their building and the tort complained of as would make plaintiffs in any degree participants in the conduct which caused the damage. As has been said: "The right of a man to make free use of his property is not to be curtailed by the fear that his neighbor will make a negligent use of his." 1

Thomp. Neg. 168. See, also, *Fero v. Buffalo R. Co.* 22 N. Y. 209, and *Jefferis v. Phil., W. & B. R. Co.* 3 Houst. 447.

2. There was evidence to sustain the findings of negligence on the part of defendant, and as to the amount of damages.

3. Evidence to prove that some of the goods injured were on the roof of the house, was introduced by plaintiff, without objection. The variance between the averment and the proof as to the location of the goods was not material. Code Civil Proc. 470. And, no objection having been made to the evidence when offered, nor any motion made to strike out the testimony, the point as to variance cannot be taken here. *Kiler v. Kimbal*, 10 Cal. 267; *Owen v. Frink*, 24 Cal. 171; *Boyce v. California Stage Co.* 25 Cal. 460; *Bell v. Knowles*, 45 Cal. 192; *Brady v. Reese*, 51 Cal. 447.

4. It is urged, the finding that the goods destroyed were stored in the building is not sustained by evidence which shows that some of such goods were on the roof of the building. But the material fact, that the goods were on the premises of plaintiffs, was alleged and found.

Judgment and order affirmed.

We concur: McKEE, J.; ROSS, J.

65 Cal. 623

McKAY v. RILEY and others. (No. 8,357.)

Filed September 26, 1884.

1. SALE—BREACH OF CONTRACT—DAMAGES.

In an action for breach of contract of sale, where the articles contracted for had no market value, the measure of damages suffered by the vendee is the actual loss by reason of not receiving an advance or profit through agreements made in reliance on the fulfillment of the vendor's contract.

2. APPEAL—EVIDENCE—OBJECTION MADE FOR FIRST TIME IN APPELLATE COURT.

Where no objection to evidence was made in the lower court, it cannot be made for the first time in the supreme court.

Department 1. Appeal from the superior court of the city and county of San Francisco.

M. B. Harrison, for appellants.

C. E. Boyce, for respondent.

McKINSTRY, J. 1. There was evidence to sustain the findings as to the existence of a partnership between defendants.

2. There was evidence tending to prove that no considerable quantity of the pipe, the subject of the contract sued on herein, was in other hands than those of defendants. If the jury were satisfied there was no market value for the article, they were justified in allowing

plaintiff, as damages, the amount he lost by reason of his not being able to perform his agreement to deliver the pipe to third persons at an advanced price. Ordinarily, the rule of damages, in actions like the present, is the difference between the price agreed to be paid and the market value, because the vendee can obtain the article contracted for at the market price. When, however, the circumstances are such that the vendee cannot thus supply himself, the rule does not apply, for the reason of it ceases. *Bank v. Reese*, 2 Casey, 143. In such case the true measure of damages is the actual loss sustained by the vendee by reason of his not receiving an advance or profit through agreements which he himself has made in reliance upon the fulfillment of his vendor's contract. *McHose v. Fulmer*, 73 Pa. 367.

3. The record does not show any material variance between the allegations of the complaint and the testimony or findings.

4. Appellants contend that the judgment must be reversed because the plaintiff, having attempted to prove an agreement between himself and Williams, Dimond & Co., for the sale of the flues or pipe which defendants had agreed to sell to him, showed that the price to be paid by Williams, Dimond & Co. was more than \$200, but failed to show either that any part of the purchase price was paid to him, or that the agreement was evidenced by a memorandum in writing. But even if it be conceded that the want of a writing can be objected to for the first time in this court, no objection was taken in the court below that plaintiff failed to prove that he received any portion of the price to be paid by Williams, Dimond & Co. It is well settled here that an objection to evidence cannot be made here for the first time which might have been removed by the opposite party had it been taken in the lower court. Besides, the evidence tended to prove that plaintiff could have sold to Williams, Dimond & Co. at an advanced price, just as evidence of a market price would have proved that plaintiff could have sold for the market price. It cannot be assumed, on the mere suggestion of defendants, that if plaintiff had received the pipe from them he would have failed to deliver it to his vendees, or that the latter would have refused to pay to plaintiff part or the whole of the price by them to be paid.

Judgment and order affirmed.

We concur: MCKEE, J.; ROSS, J.

ANDREWS v. RUNYON. (No. 9,203.)

Filed September 30, 1884.

1. MARRIED WOMEN—RIGHT TO SUE ALONE—DESERTION.

A married woman is authorized to sue alone, when, at the time of commencing the action, she is living separate and apart from her husband by reason of his desertion of her; and it is desertion on his part, if, after his wife has left him, she offers within the statutory period to return and in good faith fulfill the marriage contract, and he refuses such offer and condonation.

2. CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS TO JURY.

A statement by the court to the jury that there was no contributory negligence, is in effect stating to the jury what the evidence proved,—a matter wholly within the province of the jury to determine. The authority of the court is limited to stating the evidence and declaring the law.

3. ORAL CONTRACTS—INTENTION OF PARTIES.

The understanding and intention of an oral contract are to be inferred from what was agreed on contractually, not from a mere suggestion in a conversation in regard to the contract; and a party would not be liable for an illegal act done in pursuance of such conversation unless he intended to bind himself therefor contractually.

4. JURY—INSTRUCTIONS—REFUSAL BECAUSE OF LENGTH.

A court cannot refuse to give instructions because of their length. The court may dismiss the jury for a time that it may have an opportunity of considering the requests.

Department 2. Appeal from the superior court of Sacramento county.

A. Campbell, Hart & White, P. J. Van Loben Sels, and L. S. Taylor, for appellants.

Grove L. Johnson and Jones & Martin, for respondent.

THORNTON, J. This action was instituted to recover damages for personal injuries alleged to have been occasioned by the negligence of defendants, and comes before this court on appeal of the parties last named from the judgment and order denying a new trial. Many points are argued in the briefs of counsel which we are called on to consider and determine. As to the objections to the complaint, we are of opinion that they are not well taken. It is urged that the plaintiff was a married woman who had deserted her husband, and therefore was not competent to sue alone. The court, in its direction to the jury, ruled against this contention, and error is assigned on this ruling.

The statute (Code Civil Proc. 370) requires that when a married woman is a party, her husband must be joined with her, except under certain conditions therein specified. The exception under which the plaintiff claims that she is authorized to sue alone, is that she was, when this action was commenced, living separate and apart from her husband by reason of his desertion of her. The evidence on this point is as follows: The plaintiff and her husband resided at Walla Walla, in the territory of Washington. The husband failed to support her and his child by a former marriage, (the support of the child and herself thus falling on her,) and on this account she left him in

May, 1880; that she offered to go back to him and perform her duties as a wife in January, 1881, again in May, 1881, a third time in July, 1881, and still a fourth time in October, 1882, and that he refused to take her back. When she made the offer in January, 1881, she was in Umatilla, in western Oregon, about 20 miles from Walla Walla; that she did not return at that time because she was sick and unable to go. Of this sickness her husband knew, and manifested no interest in her; never inquired about her, but simply refused to have anything to do with her or take her back; that if she had not been sick and unable to go she would have gone back. These offers were made in good faith, as the plaintiff testified, and there is no contradictory testimony. It further appears that in August, 1882, she received a letter from her husband asking her to come back; that in reply she wrote an amiable answer; that in October, 1882, he wrote her another letter stating that he had a home in Lewiston, Idaho, describing the house and saying he wanted her to be with him, but before she received this letter she had another from him in answer to one from her written from the county hospital, refusing to live with her, and telling her that the county hospital was the proper place for her. This last was written after he had heard of her crippled condition, caused by the injury on which this action is based. These offers by the plaintiff to return were all made by letter, and except the first, in January, 1881, written from Umatilla, were written from this state, to which she had subsequently come.

The statute (Civil Code, art. 2, c. 2, first division) on this subject defines willful desertion as "the voluntary separation of one of the married parties from the other with intent to desert." Civil Code, § 95. It would seem from the evidence above given that if there was any desertion in the first place it was on the part of the plaintiff. It is further provided, in a subsequent section (102) of the article above cited, that "if one party deserts the other, and before the expiration of the statutory period required to make the desertion a cause of divorce returns, and offers in good faith to fulfill the marriage contract, and solicits condonation, the desertion is cured. If the other party refuses such offer and condonation the refusal shall be deemed and treated as desertion by such party from the time of refusal."

Did not the plaintiff comply with the requirements of this enactment by her offers? It is said she did not, for the reason that the law requires a return,—an actual physical return; and this she did not do. It will be observed that the first offer was made from Umatilla, when she was only 20 miles from the place of his residence, and that he refused to receive her or to have anything to do with her. Does the law require any actual physical return when the wife, in the vicinity of her husband's home, offers to go back and resume the performance of her marital duties, and he, in effect, tells her, you need not come; I wish to have nothing to do with you? Must she perform

a journey entirely useless for any purpose, when she is told, you need not come, for your coming will accomplish nothing? The other offers to return appear to have been after the statutory period had passed, but they tend to sustain the conclusion here reached, that the husband was unwilling to receive his wife in January, 1881, when an offer was made within the statutory period, and that his intent was then not to receive her at all. Entertaining these views of the law, we are of opinion that the court below did not err in holding that the plaintiff was competent to maintain this action.

The court erred in not sustaining the motion for a nonsuit as to Loben Sels. The evidence on the point of contributory negligence on the part of plaintiff was such as must have carried it to the jury, under the rule laid down in *Fernandes v. Sacramento City R. Co.* 52 Cal. 45, which may be regarded as settling the law on this point in this state.

The court, in its rulings, did submit this question to the jury, but with an observation which, in our judgment, invaded their province. The court on this point gave these directions:

"There is a question here as to contributory negligence. The general rule about that is that, although a defendant may have been the prime cause of the injury, yet, if the plaintiff is also guilty of what is called contributory negligence, he cannot recover. Negligence is generally understood to be the omission to do something which an ordinarily reasonable and prudent man would do under the circumstances, or the doing of something which an ordinarily prudent man would not do. It is claimed in this case that the driving of a team at night along the road is contributory negligence. I think that is more a question of fact than of law for you to determine. If you believe that the plaintiff was guilty of contributory negligence in the sense in which I have defined it, she could not recover."

The court then made this remark:

"I do not see that the question whether or not a person driving at a certain gait along a road known to him, after night, is an unreasonable act, something which an ordinary man would not do."

This was in effect telling them that there was no contributory negligence by plaintiff. If this was so, the court should not have submitted the question to the jury at all, but should have directed them that there was no question of the kind for their consideration. The court did right in submitting the question to the jury, but when the instruction given was qualified by the remark just above quoted, they were directed as to what the evidence proved. The authority of the court is limited to stating the evidence and declaring the law.

The remarks of the court in relation to the contract were, we think, calculated to mislead the jury. We refer to that part of the charge in which the jury is told that "if, however, at the time the contract was made, it was the fair understanding and intention of all parties that the road was to be dug up for the purpose of building the levee, then I think that whoever made the contract is liable, because, if those be the facts, the digging up of a public road was an inherent

part of the scheme of building the levee." If it was a part of the contract that the road was to be dug up to build the levee, Runyon would certainly be bound. It must be understood in the sense that the contract was so made to bind Runyon. If by this is meant that the jury were to infer from some conversation with regard to where the contractor was to cut the road to build the levee, and before the contract was entered into, then the jury should have been directed not to regard it unless it entered into and formed a part of the contract. The same remark applies to any conversation on this subject occurring after the contract, which was an oral one, was entered into; that it was intended by what was said on the subject that the contract should be added to in that regard. As to defendant's liability in this regard, the direction should have been that the jury must be satisfied that it was a part of the contract to build the levee with dirt taken from the road, or they were to disregard it. The law does not justify the holding a party bound for the consequences of an illegal act, from a mere suggestion in a conversation in regard to a matter of contract, unless there can be justly inferred from it an intention on his part to bind himself contractually. The understanding and intention are to be inferred from what was agreed on contractually. As to the court's refusing to give the 33 instructions or requests asked by defendant, on account of their length, we think it only necessary to say that the court is not justified to refuse to pass on such instructions when handed in at the time prescribed by the rule. The jury can be dismissed for a time, that the court may have an opportunity of considering the requests.

It is said that the matters of law embraced in the requests were given by the court. We do not think, as the case goes back for a new trial, it necessary to compare the requests referred to with the instructions given by the court, to see whether such was the case, as we cannot think it will occur again in a new trial.

For the errors pointed out, the judgment and order are reversed, and cause remanded for a new trial.

We concur: SHARPSTEIN, J.; MYRICK, J.

65 Cal. 626

BLAND v. SOUTHERN PAC. R. Co. (No. 8,030.)

Filed September 30, 1884.

1. **CONFLICTING EVIDENCE—VERDICT.**

Where the evidence was conflicting, the verdict of the jury will not be disturbed on appeal.

2. **EVIDENCE—INJURIES—NON-EXPERTS AS WITNESSES.**

A person, though not an expert, is competent to testify to consequences immediately following upon every bodily injury, and palpable to the senses.

3. DAMAGES—EXPULSION FROM RAILROAD CAR—CONSEQUENCES.

Where a person ejected from a railroad car sued to recover damages for injuries from such expulsion and the walk which followed it, if a certain necessity to take the walk was imposed on plaintiff by such expulsion from the car, the walk became a direct consequence of the expulsion, within the rule which allows damages for direct consequences of any trespass.

Department 1. Appeal from the superior court of Santa Clara county.

D. M. Delmas, for appellant.

McKissick & Rankin and Moore, Laine & Johnston, for respondents.

By THE COURT. 1. The first point made by appellant is that the verdict is contrary to the evidence, for the reason that plaintiff was rightfully expelled from the train of defendant, without unnecessary force, and at a proper place. Appellant contends the evidence proved that the conductor of the train offered to return, and did return, to plaintiff the two dollars paid as and for his fare, before he ejected plaintiff from the car. The plaintiff testified: "When we got to the platform he put his hand in his pocket and handed me the two dollars, holding me all the time with the other hand. As he gave me the money he shoved me off. The conductor did not return or offer to return the two dollars I had paid him, or any portion of it, until he thus shoved me off." The fare claimed by the conductor was two dollars and twenty cents. There was at least a substantial conflict in the evidence as to the point whether the two dollars, handed by plaintiff to the conductor, were or were not returned before the latter commenced to remove the plaintiff, or stopped the train. The evidence is very different from such as it appeared in the record when the case was here before. *Bland v. Southern Pac. R. Co.* 55 Cal. 570. We cannot say the verdict, so far as it is based on the question of fact above considered, should have been set aside.

2. Appellant contends the court below erred in permitting plaintiff to testify as an expert to the consequences of the injuries by him sustained. We can see no impropriety in permitting the plaintiff to testify that he had lost a leg, with reference to the construction of an artificial leg used by him, and as to the effect upon the stump of a blow or jar. The question was put to the witness: "Describe to the jury what effect this injury, this shock, produced upon your general system, especially upon your nervous system, your head, and spinal column." This question was answered at length, but no objection was made to the question, nor did defendant move to strike out the answer. Subsequently the witness was asked what effect "the accident" had upon particular organs. To this question the defendant objected as "irrelevant, immaterial, and incompetent." Of course, the mere fact the plaintiff discovered that the organs in question had wasted away perceptibly six or eight months after "the accident," and that from thence the atrophy con-

tinued, would not necessarily prove that the decline was a consequence of plaintiff's expulsion from the car. In passing upon the admission of such evidence, the court must be careful not to be misled by the fallacy, *post hoc ergo propter hoc*. But, unless we can say that no immediately perceptible evil effects could have been produced upon the organs referred to in the question, we cannot say the objections to the *question* should have been sustained. There are consequences immediately following upon every bodily injury, palpable to the senses, and to which the non-expert is competent to testify.

3. No objection was made to the hypothetical question propounded to the medical experts by counsel for plaintiff.

4. Appellant contends that an instruction of the court, permitting the jury to consider the "voluntary walk" of plaintiff as an element of damage, was erroneous. The question whether the walk to the station at Santa Clara was a prudent act for plaintiff, under the circumstances, was left to the jury. We think the statute (Civil Code, 487) does not impose the absolute duty upon a passenger evicted from a car to go to the nearest dwelling-house, there to remain until he can be returned by carriage to his home, or to the station at which he entered the car. Whether the train was stopped "near" a dwelling-house, within the meaning of the Code, was itself a matter of fact to be determined by the jury. The direction of 487 of the Code to conductors or managers of railroad trains imposes on *them* a positive duty, not upon the passenger removed. The very highest degree of care and caution is not required of the expelled traveler. It is sufficient if he uses such prudent care as is reasonable under the circumstances, and that matter was submitted to the jury.

The court stated to the jury that plaintiff *claimed* that concussion of the *spine* had been produced by his expulsion from the car and the distance he "was required to walk." And the court said: "It is for you to determine from his evidence whether concussion of the spine has been suffered by plaintiff, and, if so, whether it was in consequence of his removal from the car, and the walk which followed upon it, or some other precedent or subsequent cause," etc. It is not urged by appellant that the jury were led to believe that in the opinion of the court it was a prudent and necessary thing for plaintiff to walk back to the station. It is not claimed that the court charged as to a matter of fact, (in violation of the constitutional provision,) but that the court should have held, as matter of law, that the walk was not necessary, and ought to have refused to charge that any injury produced by the walk *could be* considered in finding damages. We think, however, if a certain necessity to take the walk was imposed on plaintiff by his expulsion from the car,—by which is not meant that the walk was indispensable, or the most prudent thing which plaintiff could have done, but that it was that which ordinary prudence and caution dictated as the better course to pursue, in order

to avoid more inconvenience or discomfort,—the walk became a direct consequence of the expulsion, within the rule which allows damages for the direct consequences of any trespass.

Judgment and order affirmed.

65 Cal 625

PEOPLE v. SCHENICK. (No. 20,006.)

Filed September 30, 1884.

WITNESS—IMPEACHMENT—EVIDENCE.

The fact of a former conviction of misdemeanor cannot be proved by examination of the witness for the purpose of impeaching him. The record of conviction of misdemeanor is the best evidence of the fact, and it is indispensable.

Department 1. Appeal from the superior court of the city and county of San Francisco.

John D. Whaley, for appellant.

Atty. Gen. Marshall, for respondent.

McKEE, J. When the defendant was under cross-examination as a witness on his own behalf, the district attorney asked him this question: "On the third of May, 1882, was a judgment pronounced against you in the police judges' court of the city and county of San Francisco for the crime of petit larceny, under the name of L. Smith?" Defendant's counsel objected to the question upon several grounds, and among others on the ground that it calls for secondary evidence. The objections were overruled, and defendant excepted. By section 2051, Code Civil Proc., it is allowable to impeach a witness by asking him if he has been convicted of a felony, or the fact may be proved by producing the record of conviction. Proof of such a fact by oral testimony of the witness is, however, an exception to the general rule as it existed before the Code. Under that rule the only admissible evidence of the former conviction of a witness of felony was the record of conviction. And the rule is yet applicable to the proof of conviction of an offense other than felony, for the Code, which has made an exception to the rule in convictions of felony, declares that a witness cannot be impeached by evidence of particular wrongful acts. These do not fall within the exception; therefore the fact of a former conviction of misdemeanor cannot be proved by the examination of the witness. The record of conviction of misdemeanor is the best evidence of the fact, and it is indispensable. Code Civil Proc. § 1863; *People v. Reinhart* and *People v. McDonald*, 39 Cal. 449, 697.

Judgment reversed, and cause remanded for a new trial.

We concur: ROSS, J.; MCKINSTRY, J.

PEOPLE *ex rel.* HOY *v.* ALVORD and others. (No. 9,559.)

Filed September 30, 1884.

POLICE COMMISSIONERS OF SAN FRANCISCO—ELECTION.

On authority of *Staude v. Election Com'rs*, 10 Pac. C. Law J. 29, holding that police commissioners of San Francisco are not elective officers, judgment affirmed.

In bank. Appeal from the superior court of the city and county of San Francisco.

Atty. Gen. Marshall and John J. Coffey, for appellants.

Alfred Clarke, for respondents.

BY THE COURT. In *Staude v. Election Com'rs*, 10 Pac. C. Law J. 29, it was held that the police commissioners of the city and county of San Francisco were not elective officers. Upon the authority of that case the judgment in this must be affirmed. It is so ordered.

65 Cal. 635

RECLAMATION DIST. NO. 3 *v.* GOLDMAN. (No. 9,505.)

Filed September 30, 1884

1. JUDGMENT OF SUPREME COURT—LAW OF CASE.

A judgment of the supreme court in a case becomes the law of the case in all its stages, while the facts remain the same.

2. SWAMP-LAND RECLAMATION DISTRICT—ORGANIZATION.

The board of supervisors of a county is by the act of 1868, providing for the organization of swamp-land districts, authorized to employ a clerk to attend to matters pertaining to swamp lands; and among such matters is that of calling a meeting of the land-owners concerned in the business of organization under such act.

3. SAME—ASSESSMENT—DUE PROCESS OF LAW.

An assessment made on lands within a reclamation district, under the act of 1868, can be enforced only by suit against the tax-payer, in which suit notice must be given to the defendant and an opportunity afforded to him to be heard respecting the assessment; and when this is done, the tax-payer has been afforded all that the guaranty of due process of law requires and secures.

4. SAME—BENEFIT—MEASURE OF ASSESSMENT.

A failure to assess lands within a reclamation district does not vitiate the assessment; the benefits to each tract are to be adjusted by the commissioners as it is in their judgment benefited, and full discretion is vested in them to fix the amount to be paid as a measure of the present or prospective benefits, so that, if there are no benefits, no assessments must be charged on the land.

5. RECLAMATION—DEVIATION FROM PLAN.

A deviation from approved plans in making the reclamation, where no injury results therefrom, is a discretion vested by statute in the trustees; and a work of reclamation, with a deviation justifiable under the circumstances, is a substantial compliance with the original approved plan.

6. INSUFFICIENCY OF ASSESSMENT—SUPPLEMENTARY ASSESSMENT.

Whenever the tax levied is insufficient to pay for the reclamation or for necessary repairs, the supervisors of the county where the district is situated shall, upon revised estimates furnished by the trustees, make additional levies of assessment for that purpose.

Department 2. Appeal from the superior court of Sacramento county.

J. F. Carey and G. W. Gordon, for appellant.

H. McKune, for respondent.

THORNTON, J. This action was instituted to foreclose the alleged lien of a delinquent assessment upon lands within a reclamation district, situate in Sacramento county. The district existed before, but was reorganized under the act of March 28, 1868, "to provide for the management and sale of the lands for the state." St. 1867-68, p. 507. It is urged here on behalf of respondent that the judgment should be affirmed for the reason that the action is wrongly brought; that it is brought in the name of the district, when it should have been brought in the name of the people. But when this cause was here before, (61 Cal. 205,) on appeal from the judgment which had passed in favor of defendant by reason of a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action having been sustained by the court below, this court reversed the judgment, thus holding that the complaint was sufficient in its statement of facts. That the question here made is within the scope of the demurrer heretofore passed on is held in *People v. Haggin*, 57 Cal. 579. If we were to hold on this appeal that the action was not properly brought, we would be practically overruling the decision on the former appeal. We would be holding now that the complaint did not state facts sufficient to constitute a cause of action, whereas we held then that the complaint, which is identical with the one before us on the former appeal, did state facts sufficient to constitute a cause of action. This we cannot do under repeated decisions of this court. The former decision becomes the law of the case. See *Clary v. Hoagland*, 6 Cal. 685; *Davidson v. Dallas*, 15 Cal. 75; *Mulford v. Estudillo*, 32 Cal. 131; *Jaffe v. Skae*, 48 Cal. 540; *Donner v. Palmer*, 51 Cal. 636. The same facts, so far as they relate to the question we are considering, are before us now as on the former appeal, and the judgment then rendered must constitute the law of the case in all its stages. See cases above cited. In view of this rule, which we regard as well settled in this state, we must hold that the question whether the action is properly brought in the name of the reclamation district is no longer open for decision.

The plaintiff was organized in 1861 under the laws then existing. In 1871 it took steps to reorganize under the forty-third section of the act of 1868 above referred to. St. 1867-68, pp. 507-519. It appears from the bill of exceptions that the plaintiff on the trial introduced in evidence the original record of the proceedings of the land-owners of district No. 3, organizing the district in conformity with the provisions of section 43, above cited. But the meeting for the purpose of organization was called by Grove L. Johnson, who was at that time swamp-land clerk for the board of supervisors of

Sacramento county, in which county the district is situated. The statute (see section 43, above cited) requires that such meeting shall be called by the clerk of the board of supervisors. At the time these proceedings were had, to-wit, in May, 1871, the county clerk was then *ex officio* clerk of the board of supervisors. It is urged that the organization of the plaintiff into a reclamation district is void, and it can maintain no action, for the reason that the meeting for such organization was not called by the officer designated by the statute, it having been called by the swamp-land clerk. But we are of the opinion that the proviso to the forty-sixth section to the act of 1868 makes the swamp-land clerk the clerk of the board of supervisors, for the purpose of calling such meeting. By that proviso, the board is empowered to employ a clerk to attend to matters pertaining to swamp lands; and among such matters, in our view, is that of calling a meeting of the land-owners concerned in the business of organizing under the act of 1868. The point that the due process of law guarantied to the defendant, and secured by the fourteenth amendment of the constitution of the United States, is violated in the assessment of defendant's property, is disposed of adversely to the contention of defendant by *Hager v. Reclamation Dist. No. 108*, 111 U. S. 701-711; S. C. 4 Sup. Ct. Rep. 663. The case just cited, like the one under consideration, was brought to enforce the alleged lien of an assessment made on lands within a reclamation district formed under the act of 1868. The court held that such an assessment, according to the laws of this state, could be enforced only by suit against the tax-payer, in which notice must be given to the defendant, and an opportunity afforded him to be heard, respecting the assessment, and that in such suit the tax-payer may set forth, by way of defense, all his grievances. Where this opportunity to be heard respecting the assessment is afforded to the tax-payer in an action, there has been given him all that the guaranty of due process of law requires and secures, and he has nothing to complain of in regard to such process. See *Reclamation Dist. No. 108 v. Evans*, 61 Cal. 104. We are of opinion that there is no violation of the constitution of the United States in the proceedings concerning the assessment involved in this case, and that it must be so ruled.

This court is of opinion that the finding of the court below, that no statement as required by the amended section 34 of the act of 1868 (see St. 1871-72, p. 668) was ever presented by the board of trustees of the district to the board of supervisors of Sacramento county, is not sustained by the evidence. It seems from the testimony of Sheehan, who was one of the trustees, that he, by authority of the board of trustees and under its direction, furnished all the data to their attorney, Grove L. Johnson, who prepared the statement under the direction of Sheehan, and presented it, on behalf of the board of trustees, to the board of supervisors. The statement had to it the name of T. W. Sheehan; appended to his name is the word "secre-

tary." If the name of Sheehan was not signed to this statement in his own handwriting, it was done by Johnson by his authority. Sheehan testifies that the figures as inserted in it were such as he was authorized by the board of trustees, at its meeting on the tenth day of July, 1876, to insert, as well as the other things which appear in it. His testimony substantially amounts to this: That the contents of the statement were agreed on by the board of trustees at its meeting, to be reported to the board of supervisors in a statement, and he was authorized to have the statement prepared accordingly and presented to the board. There was no testimony to the contrary. It is said that the minutes of the meeting of July 10th are contrary to this, for the reason that more appears in the statement than in the minutes. We do not concur in this conclusion. Sheehan explains this in his testimony. He testified that the report made to the board of supervisors was based on estimates made by the board of trustees before he left the district. We think it satisfactorily appears from the testimony of the witness that if any amounts are inserted in the statement which do not appear in the minutes, that they were there inserted at the oral direction of the board of trustees. We can see no reasonable objection to this. The law does not require that the board shall keep any minutes or record of its proceedings. It is only required (section 36 of act of 1868) to keep accurate accounts of all expenditures. If the law did require it to keep such record, what was done by the board at its meeting and not inserted in the record might be established by oral evidence.

The defendant (respondent here) contends that the act of 1868 (section 33) requires the board of trustees to report to the board of supervisors the plans of the work made by the engineer employed by it, (section 32;) that no such plans were reported. But, inasmuch as this is found adversely to the contention of respondent, and he is not the appellant, we are of opinion that the point is not before us for decision on this appeal. The commissioners, on making the assessment of the cost of reclamation, inserted in its assessment list a tract of land belonging to one McIntyre, by a proper description, in the same way as it inserted tracts of land belonging to other persons. A portion of that list is inserted in the bill of exceptions to show the manner in which this tract and other tracts were dealt with by the commissioners:

EXHIBIT A.

ASSESSMENT LIST FOR RECLAMATION PURPOSES UPON THE LANDS WITHIN SWAMP-LAND DISTRICT NO. 3, SACRAMENTO COUNTY, CALIFORNIA.

Names of the owners of each tract assessed.	Description of each tract assessed.	No. of acres in each tract.	Amount of the charges assessed against each tract.		Remarks.
			Dolls.	Cts.	
Clarke, C. W.....	All of swamp-land survey No. 301, not embraced in the lands of A. M. Tullis.....	430	4,252	70	Paid to D. E. Callahan, July 2d. 1877.
Goldman, Chas.	Swamp-land survey No. 492.....	195	1,888		
McIntyre, Geo....	Swamp-lands survey No. 507.....	114.98	0,000	00	

From this it appears that no part of the estimated cost of reclamation was imposed upon the McIntyre tract, the charge against it being represented by a row of ciphers. It is here urged that this vitiated the entire assessment. It is found that the commissioners jointly viewed the lands in the district, and assessed on these lands other than the McIntyre tract the whole assessment to be raised. The court below found that this piece of land was excluded from the assessment because it lies at the extreme lower end of Grand island, (a part or the whole of which island constituted the district,) and was a narrow strip running to a point, and, owing to the flow of waters of Cache creek at that point, it would be difficult to maintain a levee around it. There was but one witness (William Gwynn) who testified on this point. His testimony is as follows:

"I was a trustee of district No. 3 from May 10, 1871, to about May 10, 1874; am familiar with its levees, localities, and position. Swamp-land survey No. 507, containing a little over one hundred acres, comprises the south end of the island. The land in that survey is an elongated three-corner triangle. In 1871,—the land then being very low,—and in times of high water, Cache slough, which is opposite, would overflow and inundate, and so high and great was the rush of waters that we feared if we put the levee there it could not be sustained, and thought that the best way was to make a cross-levee above this rush of waters. It was to save the upper levees; that was the intention of that, and the trustees so decided."

Swamp land survey 507 is McIntyre's land. We infer from this testimony that this land was left outside of the levee for the reason that the expense of constructing and maintaining the levee, so as to include it, would be greater than any profit or benefit to the district or the tract that would result from including it, and not alone because it was difficult to maintain it. Therefore, a cross-levee was built, excluding this tract. We think the court erred in finding that the difficulty of maintaining a levee so as to include this McIntyre tract was the sole or controlling reason for excluding it, and that it should have found as indicated above. But it is said that under any cir-

cumstances the failure to assess the McIntyre tract was fatal to the assessment. It is evident, from the testimony above given, that the land was not assessed because it was not benefited. Does the law require that lands within a reclamation district, not benefited, shall be assessed? Clearly, here, the land of McIntyre was not and would not be benefited at all. Why should anything be assessed upon it when the reason by which assessment for benefits is sustained does not exist? It would be the height of injustice to put a charge upon land, upon a surmise or theory that it is or would be benefited, when the fact is established that it is not and would not be benefited. Nor do we think that the statute makes any such requirement. The benefits to each tract are to be adjusted by the commissioners as it is in their judgment benefited. Full discretion is vested in them to fix the amount to be paid, and such amount must be fixed as a measure of the resulting present or prospective benefits. If no benefits, no assessments must be charged on the land. According to the view urged by the respondent's counsel, an assessment, however small, would satisfy the requirement of the law. Even one cent or one mill would be sufficient. In this state of the case, we think the maxim *de minimis non curat lex* applies. If one cent or one mill would satisfy the demands of the law, and we are of that opinion, we do not think that we should be justified in holding the entire assessment null for the failure to assess so insignificant a charge. Nor do we think that a deviation from the approved plans in making the reclamation, where no injury results from such deviation, but rather a benefit, is outside of the discretion vested by the statute in the trustees. Some discretion must be left to the trustees in regard to the work, and a trifling deviation from the plans, or a deviation which would result in benefit, should not be regarded as a violation of the requirements of the statute. A work of reclamation, with a deviation justifiable under the circumstances, may well be regarded as a substantial compliance with the original approved plan.

But it is further urged that the board of supervisors of Sacramento county had no power to order a further assessment, because the formation of the district was not approved by it. And, to maintain this point, we are referred to section 34 of the act of 1868, as amended in 1872. By the section, as amended, it is provided that "in case the original assessment be insufficient to provide for the complete reclamation of the lands of the district, or in case further assessments be required, from time to time, to provide for the protection, maintenance, and repair of the works of reclamation, the trustees should present to the board of supervisors of the county, by whom the formation of the said district was approved, a statement of the work done or to be done, and its estimated cost, and said board shall make an order" for the assessment. The formation of the district in this case was not approved by the board of supervisors of the county mentioned, nor was it required by the statute. Section 43,—which pro-

vides for the organization of a district already formed,—when the act of 1868 went into effect, did not require such approval. That section required that a notice should be given, by publication in a newspaper published in the county, or by posting three notices in the district, for the election of trustees and the establishment of by-laws. It then prescribes that the holders of certificates of purchase on patents, or their agents, representing one-half the land held, shall constitute a quorum for the transaction of business at such meeting; and the trustees elected at this meeting shall have power, and it shall be their duty, to carry out and complete all unfinished business commenced by the board of supervisors, and to do all other things authorized by the by-laws of the district or by this act.

It appears that such a meeting was called and trustees elected. When this was done, we are of the opinion the district was organized under the act of 1868, and this was clearly ruled in the opinion of the lower court. The provision as to the approval of the formation of the district applies only to districts originally formed under the act, (sections 30, 31,) and has no application to districts previously formed and organized under the act of 1868. It is further provided, as to such previously existing districts, that, whenever any such district shall organize under the provisions of this act, (of 1868,) the supervisors of the county shall turn over to the trustees all the books and papers in their possession relating solely to that district. It was certainly the intention of the framers of the act, as it was at first provided, that, whenever the tax levied should be insufficient to pay for the reclamation or for necessary repairs, the supervisors of the county where the district was situated should, upon revised estimates furnished by the trustees, make additional levies of assessment for that purpose. Sections 33, 34. Such intention existed and applied as well to districts previously existing and organized under it, as to districts originally formed under it. Such intention is indicated by what has been just above cited from the statutes. We see no reason to hold that such intention on the part of the legislature ceased to exist by the amendment in 1872 of section 34. Further, the object of the requisition of the amended section to present the statement mentioned to the board of supervisors, by which the formation of the district was approved, was to direct to what board the statement should be presented when the district included lands lying in more than one county. In such case a copy of the petition, after approval by the board of supervisors of the county to which it had been first presented, had to be furnished by the trustees to the board of supervisors of each county in which any portion of the lands lay. Section 32. This provision was inserted to designate to the trustees to what board to present a statement, where the lands lay in more than one county. But one board had to approve the petition, and the statement was to be presented to that county, no matter in what number of counties the lands of the district lay. But when the lands,

as in this case, were in one county, to that board only must the petitioner go. Under such circumstances the board of that county alone was to deal with and order the levy. We think it sufficiently appears from the whole act that the intention was that the statement, in case the land was situated in one county, should be presented to the board of supervisors of that county. We are of opinion that the statement herein was properly presented to the board of supervisors of Sacramento county, in which county the district was situate, and in so ruling we are carrying out the intention of the law-makers. We are, therefore, of opinion that this objection to the assessment cannot be sustained.

For the reasons above pointed out, the judgment and order must be reversed, and the cause remanded to be tried anew in accordance with the views herein set forth; and it is so ordered.

We concur: MYRICK, J.; SHARPSTEIN, J.

65 Cal. 644

PEOPLE v. JORDAN. (No. 10,905.)

Filed September 30, 1884.

1. CRIMINAL PROCEDURE—NOTICE OF APPEAL—SUFFICIENCY.

A notice of appeal, entitled "In the Superior Court of the City and County of San Francisco, State of California," and referring to the order of "said court," plainly indicates the intention to appeal from an order of the superior court.

2. SAME—APPEAL—JUDGMENT ON DEMURRER.

An appeal from an "order sustaining a demurrer" is sufficient, and effectually an appeal from a judgment on demurrer.

3. SAME—MISDEMEANOR—APPEAL—PRACTICE.

The provisions of the Penal Code with reference to appeals in criminal cases amounting to felonies, are applicable to misdemeanors prosecuted by indictment or information, and the supreme court adopts such as the practice, and will entertain such appeals when taken in the manner prescribed in chapter 1, tit. 9, pt. 2, Penal Code.

Department 1. Appeal from the superior court of the city and county of San Francisco.

Atty. Gen. Marshall, for appellant.

John M. Lucas, for respondent.

McKINSTRY, J. Motion of respondent to dismiss appeal. This is an appeal by the people from a judgment for the defendant, on a demurrer to the indictment. Penal Code, 1238. Respondent moved to dismiss the appeal on the grounds: (1) That the notice of appeal is insufficient, ambiguous, and unintelligible, in that it purports to have been taken from an order of *this* and not of the superior court, and in that it does not designate the order appealed

from with sufficient certainty; (2) that the appeal is from an order sustaining a demurrer, and not from a judgment on demurrer; (3) that no appeal will lie, the offense charged, if any, being a misdemeanor.

1. The notice of appeal is entitled "In the Superior Court of the City and County of San Francisco, State of California," and the notice refers to the order of "said court" (which last words are claimed by respondent to relate to *this* court, because they follow immediately after the statement that the appeal is taken to the supreme court) "sustaining the demurrer to the indictment *in the above-entitled cause.*" The notice plainly indicates the purpose to appeal from a particularly described order of the superior court.

2. The Penal Code does not provide for any entry of judgment on demurrer, other than the entry of the order upon the minutes. Section 1007. The order in the minutes is the judgment. Although it is always better to employ the language of the Code, a judgment that a demurrer be "sustained" is, in effect, a judgment that the demurrer be allowed. The language of the judgment appealed from is: "It is ordered, adjudged, and decreed that the defendant's demurrer be and the same is sustained." This is in substantial compliance with section 1007 of the Penal Code. The mere fact that in the notice of appeal the judgment specifically described is called an "order," does not render the notice ineffectual.

3. The legislature has prescribed no procedure for an appeal to this court in criminal actions, except "in criminal actions amounting to felonies." Penal Code, 1235. But the supreme court has appellate jurisdiction "in all criminal cases prosecuted by indictment or information," etc. Const. art. 6, § 4. The same section of the constitution provides: "The court shall also have power to issue writs of *mandamus*, *certiorari*, prohibition, and *habeas corpus*, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction." The power to issue the writs specified, or any other writ, in a case where it may be necessary or proper to resort to it to secure the complete exercise of the appellate jurisdiction of the court, would exist had the constitution been silent on the subject. It may be conceded, for our present purposes, that where machinery has been supplied for the employment of its jurisdiction by legislative enactment, such machinery must be adopted or accepted by the court. But when a certain jurisdiction has been conferred on this or any court it is the duty of the court to exercise it; a duty of which it is not relieved by the failure of the legislature to provide a mode for its exercise. In the absence of any rules of practice enacted by the legislative authority, it is competent for the courts of this state to establish an entire code of procedure in civil cases, and an entire system of procedure in criminal cases, except that criminal actions of a certain class must be prosecuted by indictment or information. Const. art. 1, § 8.

While the English courts have recognized the power of parliament to create a practice, or to amend an existing practice, the main body of the practice was established by rules, or was the outgrowth of customs recognized and sanctioned by the courts at Westminster. Before the 1 Wm. IV. c. 70, the course of proceedings in the superior courts of law, as well respecting practice as pleading, was regulated by one of four authorities, viz.: *First*, by general statutes; *secondly*, by express written rules; *thirdly*, by *prior decisions*; and, *fourthly*, by *usage*. The statutes in general equally applied to all those courts, but the express rules were made by the judges of each court from time to time, and only applied to the proceedings of that particular court; and the decisions and usages were principally confined to a particular court. Such usages constituted what might be termed the *common law* of the court, as distinguished from the statutes and written particular rules. 3 Chit. Gen. Pr. 50. Long usage in the practice of the courts, or of a particular court, may be considered the common law of the court; for the acquiescence in constant proceedings, as well by the judges as its experienced officers, denotes that it is reasonable, and has not been found objectionable, because if it had it would soon have produced an immediate change; the judges of each court have *implied power* to alter any inconvenient practice when they think fit. *Id.* 56. In a conservative spirit Mr. Chitty adds:

"It is important that such usage should be adhered to until expressly altered by statute or rule, because, otherwise, practitioners, relying on the known practice, would be misled if there were any sudden unpromulgated changes; and the same principle, indeed, weighs against any change, unless imperatively called for by strong necessity," etc.

Doubtless, when a practice with respect to any procedure as to which the statutes are silent has been once adopted by this court, the protection of practitioners would demand that no change should be made except by rule, duly published. But the authority of any usage is derived from its recognition and sanction by the court, and we cannot decline to take cognizance of a matter clearly within our jurisdiction because the mode of procedure applicable to it has not been regulated by statute, written rule, or precedent. In such case it is our duty to create a precedent. When this is done we do not recognize an existing *usage*. But as the usages of the English courts, of however long standing, had no innate force as rules or laws, but derived their sanction solely from the court which permitted them to be followed, and which had power to alter them at any time, so this court (the statutes being silent) may adopt or ratify the practice resorted to on the first occasion when the exigencies of a cause require a reasonable and unprecedented practice to be resorted to. If *casus omissus* in the procedure established by law and written rules is called to our attention in advance, we may by rule provide for it; if not, when the case is presented, we must adopt for it an appropriate mode, in itself reasonable, which is to be followed in like cases until

altered by statute or rule. The power of courts to establish a system of procedure by means of which parties may seek the exercise of their jurisdiction, at least when a system has not been established by legislative authority, is inherent. *A fortiori* must this be so in California, where the judicial is a separate department of the government under our written constitution.

Applying these principles to the case in hand, the defendant here was prosecuted by indictment, and the legislature has failed to provide any machinery for taking an appeal from a judgment for or against him. We are confronted by the duty imposed by the constitution of reviewing the proceedings of the court below. We entertain no doubt that we have the power of declaring, and that it is our duty to declare, how this and like cases may be brought here for review. We may issue to the lower court a writ of *mandamus* or *certiorari*, or we may frame and issue any other appropriate writ. But our power is not limited in the exercise of our appellate jurisdiction to the employment of technical *writs*. We may by *rule* establish any appropriate practice for the bringing here a record or proceeding in the court below. Still further, we possess the power, as necessarily incident to our jurisdiction, of recognizing as proper any mode of procedure already adopted for bringing a cause before us. In *Pieper v. Centinela Land Co.* 56 Cal. 173, this court held that where the statute prescribes no mode by which papers used on a hearing in the court below shall be authenticated, this court has power to prescribe by rule how such papers shall be brought before it on appeal; and also (in the absence of any rule) to ratify the mode adopted in the court below. If, in the absence of legislative regulation, it may thus ratify a portion, it may adopt the whole of the procedure by which a cause is brought here.

The cases cited by counsel for respondent from 3 Dall. 321, 409, and 3 Cranch, 159, are not in point. The constitution of the United States provides that the appellate jurisdiction of the supreme court shall extend to enumerated cases, "with such exceptions and under such regulations as the congress shall make." In early cases in this state the writ of *certiorari* was refused by this court where no appeal had been provided by statute, (*Warner v. Hall*, 1 Cal. 90; *White v. Lighthall*, 1d. 347;) "but," as said by Mr. Hayne, "at that time the power of the court to frame process proper for the exercise of its jurisdiction, in cases where no process had been provided by the legislature, does not seem to have been understood." New Trial & App. § 181. The same learned writer adds: "The cases may, however, be regarded as authority upon the proposition that the constitutional jurisdiction of the court cannot be exercised in the absence of process provided by some competent authority."

The three judges who concurred in the order dismissing the appeal in *Houghton's Appeal*, 42 Cal. 58, held that the constitution then in force did not give to the supreme court appellate jurisdiction in a

statutory proceeding for *modifying grades*, etc. Also that such proceeding in the county court was a "special proceeding," and not a case at law "involving the validity of an assessment," within the meaning of the constitution. Further, that the judgment from which the appeal in form had been taken was made "final and conclusive," and unappealable, by the express terms of the statute. In that case the statute prohibited an appeal and the constitution gave none. It was, however, said, in an able concurring opinion by Chief Justice WALLACE:

"Independently of rules adopted by this court, (and there are none,) an appeal as mere procedure is defined by statute; it is essentially the creature of the statute, and may be accorded or withheld, restrained or wholly abrogated. It cannot be held to have any existence except as found in the expression of the legislative will. * * * While that instrument (the constitution) has defined the cases to which the appellate jurisdiction of this court extends, it has not attempted to provide, in anywise, for the mere instrumentalities through which that jurisdiction is to be exercised. It has left that subject *wholly at large*, and to be provided for by the legislature through statutes enacted, or, in default of them, by this court, through *rules adopted for that purpose*."

We agree in the main with the views so clearly expressed by the late chief justice, but do not assent to the conclusion that, in default of a statute, or of a rule formally adopted and promulgated, we should refuse to exercise a jurisdiction imposed upon this court by the constitution. The power to establish rules providing an appropriate practice, where the legislature has not provided such, is not derived from the statute which purports to authorize this court to make rules, but exists inherently as an incident to the jurisdiction conferred, and it can hardly be doubted that, in the absence of statute, rules of practice with respect to matters as to which the Codes are silent may be adopted, to go into force after such publication as this court may deem proper, or without any publication.

In *Middleton v. Gould*, 5 Cal. 190, it was said that, as the law stood, there was no statutory appeal from a judgment of a county court (on appeal from a justice's court) in an action of forcible entry and detainer. There is in the opinion *dictum* to the effect that the only remedy of the party aggrieved by such a judgment was to sue out a writ of error. But appellate jurisdiction, in actions of forcible entry or detainer, was not conferred, in terms, on the supreme court by the constitution of 1849, and the case does not show that the matter in dispute exceeded \$200 in value. Unless the matter in dispute did exceed \$200 in value, the supreme court, under the constitution of 1849, had no jurisdiction to review the judgment through any instrumentality. Nor does it appear that any suggestion was made to the court with reference to its power to establish or adopt an appropriate procedure for the exercise of its jurisdiction. This last remark applies equally to the case of *French v. People*, 77 Ill. 532.

In *Blum v. Brownstone*, 50 Cal. 293, it was decided that, where

the legislature had enumerated the orders of the probate court from which an appeal might be taken, no *direct appeal* from any other probate order will be entertained; and in *Sacramento, etc. R. Co. v. Harlan*, 24 Cal. 334, that a *writ of error* does not lie when an appeal has been given by statute. Neither of these cases conflict with the view we have taken. In *Ex parte Thistleton*, 52 Cal. 220, the supreme court held that the omission of the legislature to provide the machinery for the taking of appeals from the city criminal court of San Francisco to the county court was not fatal to the act creating the former court, but that the appellate jurisdiction of the county court might be exercised by means of writ of error, or—under the statute authorizing it to issue all writs necessary to the exercise of its powers—by means of an appropriate writ framed for the purpose. The supreme court reserved the question whether the county court could, by rule or otherwise, in the absence of express authority from the legislature, establish a system for the taking of appeals, saying:

“Whether, in the absence of a statute purporting to grant the power, a court on which the constitution has conferred certain jurisdiction would have the power by rule to establish the machinery for bringing within its judicial cognizance the person of a party and an appropriate subject-matter, and ^{or} prosecuting a proper plaint to judgment, is a question which need not now be considered.”

Humiston v. Smith, 21 Cal. 129, only decides that when the system provided by the practice act provides an adequate remedy, no other can be pursued. The legislature of *Alabama* having omitted to prescribe the regulations by which the ordinary constitutional power of the supreme court of that state over subordinate jurisdictions was to be exercised in criminal cases, the supreme court held that in bringing such cases before it for revision it might resort to such writs as were known to the common law. *Lynes v. State*, 5 Port. 236.

We are fully satisfied that we are empowered to make applicable to misdemeanors, prosecuted by indictment or information, the provisions of the Penal Code with reference to appeals in criminal actions amounting to felonies. We adopt the practice pursued in taking the present appeal, and will hereafter entertain appeals in criminal actions, prosecuted by indictment or information, amounting to misdemeanors only, from the judgments and orders mentioned in chapter 1 of title 9 of part 2 of the Penal Code, when the appeal is taken in the manner therein prescribed.

Motion to dismiss appeal denied.

We concur: MORRISON, C. J.; MYRICK, J.; SHARPSTEIN, J.; ROSS, J.; THORNTON, J.

66 Cal. 645

CLARK v. SMITH. (No. 7,565.)

Filed September 30, 1884.

1. APPEAL—UNDERTAKING—USE AND OCCUPATION.

An action may be brought on an undertaking on appeal, given for the use and occupation of land, upon the affirmance of the judgment; the party is not bound to wait until he regains possession of the land before he brings such action.

2. SAME—STATUTE OF LIMITATIONS.

In an action on an undertaking for use and occupation, the statute of limitations operates as a bar to such use and occupation as was had prior to four years preceding the commencement of the action, but is not a bar to that occurring during such four years.

McKEE, J., dissenting.

In bank. Appeal from the superior court of the city and county of San Francisco.

Flournoy & Mhoon, for appellants.

B. S. Brooks, for respondents.

THORNTON, J. On the nineteenth day of April, 1867, Littlefield recovered judgment, in the Fifteenth district court for the city and county of San Francisco, against Nichol and Weise for the possession of a tract of land, etc., and on appealing to this court an undertaking was given, signed by defendants, for the purpose of staying the execution of the judgment, by which they jointly and severally undertook and promised, on the part of the appellants, that if the judgment appealed from was affirmed, the appellants would pay the value of the use and occupation of the property recovered from the time of the appeal until the delivery of the possession thereof, not exceeding the sum of \$3,000. The judgment was affirmed on the thirtieth of January, 1872, and the *remittitur* was filed on the same day, in the district court above mentioned. The above facts were set forth in the complaint, and it was further averred therein that the land above mentioned was, on the twenty-third of November, 1870, conveyed to the plaintiff, and that there had been assigned to the plaintiff the undertaking, and all rights of action thereon. It is further alleged that on the same day on which the *remittitur* was filed in the district court, Nichol brought his action in the same district court against Littlefield and others, and procured an injunction to be issued restraining the defendants, including plaintiff herein, from executing the judgment above mentioned, and that the injunction remained in force until the twenty-fourth of February, 1876, when it was dissolved. The complaint proceeds to allege that the plaintiff was entitled to the use and occupation of the land conveyed, the value thereof, and that the rents, issues, and profits are of the annual value of \$2,000, all of which has been withheld from plaintiff, and that he has sustained damage to the amount of more than \$5,000. This action was commenced on the seventh day of September, 1876. To this complaint

defendants demurred, and as a ground of demurrer assigned that the cause of action was barred by the provisions of section 337 of the Code of Civil Procedure, and that it did not accrue within four years before the commencement of the action. The period of limitation mentioned in section 337 of the Code of Civil Procedure is four years. The court below overruled the demurrer. It is contended that this was error.

We consider it settled in this state that the plaintiff was not obliged to wait for the delivery of the possession of the land for which the judgment above mentioned had been recovered, before commencing his action on the undertaking, (*De Castro v. Clarke*, 29 Cal. 11; *Crane v. Weymouth*, 54 Cal. 476;) and further, that the affirmation of the judgment was the condition on which the defendant's obligation became absolute. Same cases just above cited. The court, in ruling the latter point, in *De Castro v. Clarke*, adds to it the remark, "though its extent in such a case might not be limited by that event." 29 Cal. 11. But though an action can be brought at the period and in the circumstances above stated, it does not follow that the cause of action is complete, or has accrued for use and occupation for a period of time for which a recovery could not be had in the action brought. If the action had been brought on the thirty-first of January, 1872, before delivery of possession, the plaintiff certainly could not have recovered anything for use and occupation after the trial,—may be not for any use and occupation had after the action was commenced. For such later period there would have been no breach when the action was commenced. There certainly could not have been a recovery on a breach occurring after action brought. Such being the case, the right of action only fully accrues when the use and occupation had been had. The statute of limitations can only act on breaches when they occur. Is there not a breach every day that the possession is withheld by the appellant? Why not? It has been adjudged that he is not there by right; then he is a trespasser, and for every day's trespass a new action may be commenced. Gould, Pl. § 90, c. 3; *Earl of Manchester v. Vale*, 1 Saund. 24, note 1; 1 Rolle, Abr. 545. The trespass of each day is a new trespass, and furnishes a new cause of action, though they may all be counted on in the same complaint with a *continuando*. See citations just above. We think it a just inference that the cause of action arises on each breach as it occurs, and the action for it is only barred when four years have elapsed after the right of action has become complete. Suppose the action was against the defendants in the ejectment suit, this would certainly be so. If they had occupied the prescribed period of limitation, viz., four years after the cause of action accrued, and the action was commenced on the last day of this period, there could be a recovery for the four years, and there could be no recovery for anything prior to the four years' period. Could the parties executing the undertaking be responsible

for less than the defendants above named, whether they be regarded as guarantors or sureties, or as independent promisors? Certainly, their liability, by the terms of the undertaking, would be no less than the parties for whom they became responsible. That is the language of their contract; they undertake that the appellant will pay the value of the use and occupation for the period mentioned; and they are protected by the act of limitations, just as the parties for whom they undertake, and no further.

If it is not a contract of guaranty, such contract is very analogous to it, and the decisions on such contracts afford analogies which furnish a key to the solution of the question before us. The case of *Kirby v. Studebaker*, 15 Ind. 45, affords an illustration in point. In that case two persons purchased of a third all the strawberries that might ripen on his patch during the season, and agreed to pay him a given price therefor on delivery. A fourth person became surety for the purchasers by an agreement to the effect that he would become responsible with them for the purchasers' part of the contract. Held, that the contract bound this latter person as a surety for its direct performance, and was in effect that he or his principals would pay for the berries on delivery, and that the seller might have demanded the price as each load was delivered, and on such delivery the purchasers became debtors to the seller to the amount of the berries delivered. See 15 Ind. 47, remarks of court in paragraph commencing "Now as between." Now, in this case, the right of action was complete when each load of berries was delivered, and if an action had afterwards been brought against the surety, the statute of limitations would not have barred the remedy for any loads delivered within the period of limitation, but would have been a bar for those delivered prior to the period; that is to say, the cause of action arose when the liability became complete, and the plaintiff had the whole period of limitation, whether two or four or six years, within which to bring his action. Such was the ruling in *Colvin v. Buckle*, 8 Mees. & W. 680. The contract in that case was one of guaranty, and was contained in a letter dated twenty-second November, 1817, addressed by the defendants to the plaintiffs in these words:

"You having expressed some doubts of the propriety of paying Mr. Gooch his draft on you for £850 in our favor, we hereby engage, if you will pay us the same, we will reimburse you the amount on demand, with interest, in the event of your finding it necessary to call upon us to do so, either from the state of Mr. Gooch's pending accounts with your London or Bengal house, or from any other circumstances."

The facts out of which this transaction arose are as follows: Bazette & Co., who were in this action represented by plaintiffs, were in advance to Gooch, who had sent to Calcutta a cargo of goods for sale there on his account. The goods were consigned to Colvin & Co., of Calcutta, plaintiffs' agents, and were to be disposed of there by them. The proceeds were to be used in procuring for Gooch a

return cargo, to be consigned to plaintiffs in London, so as to give them security for their advances to Gooch. In this state of things, defendants applied to Bazette & Co. to make a further advance to Gooch of £850. But as it was doubtful whether anything would be coming to Gooch on the termination of the transactions above stated, the above letter was written by defendants to the plaintiffs. On this letter Bazette & Co. accepted and paid Gooch's draft for the sum above mentioned. A difficulty arose on the return of the ship with the cargo from Calcutta. The owner of the ship (one Campion) notified the East India Company, in whose docks the vessel lay, not to deliver any portion of the cargo without his authority. The company on this notice sold the cargo, paid the ship-owner's demand for freight, and, in consequence of the conflicting claims from the ship-owner, filed an interpleader bill and paid the balance of the proceeds into court. Proceedings in court, had under legal advice, continued between the parties up to 1827, which resulted adversely to Bazette & Co., plaintiffs. In 1838 a demand for £850 was made on defendants upon their guaranty. The statute of limitations was pleaded, and the question to be decided was, when the statute commenced to run; or, in other words, when the cause of action accrued. The court observed as follows on this point: "The present action is brought on the guaranty so entered into by defendants; and the question is, when did the liability of the defendants first arise? For from that period, undoubtedly, the statute of limitations began to run." It was contended on behalf of plaintiffs that this liability did not arise until the accounts between Gooch and them had been adjusted, and that as such adjustment had been delayed by disputes, arising on the ship-owner's claim of lien for freight, between the owner and the plaintiffs, it did not finally take place until within six months before the commencement of the action, and thus the statute did not furnish a defense. The court held against this contention. "We think," said the court, by ABINGER, Chief Baron, "the cause of action arose as soon as, by the sale of the return cargo in this country, all the facts were ascertained on which the adjustment of the pending transactions might and ought to have taken place; and that the delay occasioned by the disputes between the plaintiffs and Campion does not in any manner affect the defendants. Every fact necessary to the adjustment of the accounts existed, and was fully ascertained, prior to the filing of the bill by the East India Company in 1818." As that event happened more than six years before the action was commenced, (which was in 1838,) the bar was held complete.

The rule that the cause of action accrued when the liability attached, is the rule which must govern in all cases, and the liability here attached when the use and occupation had been had, and not before. Certainly there was no bar for the use and occupation had within one year or two years, or three or four years, next preceding the commencement of the action. The cause of action having ac-

crued, the plaintiff has, under the statute, the full period of four years after such accrual had taken place. Assuredly the plaintiff had not four years during which to bring an action for a cause of action which had accrued less than four years before action brought. Hence it follows that the bar of the statute is complete for such use and occupation as was had prior to the four years preceding the commencement of the action, but is not a bar to that occurring within the above-mentioned period of four years. As the demurrer was taken to the whole cause of action, and some part of it is not barred, for that part the complaint does not state facts sufficient to constitute a cause of action. It follows, from the foregoing, the court ruled correctly in overruling it. Gould, Pl. c. 4, § 49; *Young v. Pearson*, 1 Cal. 448; *Stoddard v. Treadwell*, 26 Cal. 294. It further follows that the court properly refused the instruction designated as second in the transcript, and that it committed no error in refusing the third request. This latter request was based on the assumption that the action was commenced on the ninth of September, 1876, whereas it was brought on the seventh of that month.

As to the questions arising on the offers of defendants in connection with the receipt dated twenty-fifth of March, 1876, signed "B. S. Brooks, Attorney for Plaintiff," with the words "*Littlefield* against *Nichol et al.*" at the head of it, we think it sufficient to say that the matters proposed to be offered were all *res inter alios acta* as to plaintiff, Clark. There was no proof or offer to prove, admitting that the matters proposed to be given in evidence were otherwise admissible, that Tewksbury had any authority to bind Clark, or ever pretended to act for him. When objections were made on the ground that evidence was inadmissible as against Clark, the counsel for defendants never offered to show that Clark was so far represented in the transactions embraced in this offer as that they would bind him. No offer was made to show that Clark had any connection with the matters embodied in such offer, or that any one was authorized to act for him in such matters. We certainly cannot find cause for reversal in this. The transactions embraced in the offer took place in March, 1876, and there is no evidence whatever to show that in March, 1876, Clark was not the owner of the demand sued on, or that at that time it had passed to Tewksbury by assignment from plaintiff. The evidence relative to this assignment is very loose,—too loose to base a ruling on. The date of the assignment spoken of is not given and it was not produced, though a witness was in court, called by defendants, who stated that she thought she could produce it. Under these circumstances we hold, for the reasons above given, that the court committed no error for which there should be a reversal.

Judgment and order affirmed.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; MYRICK, J.; McKINSTRY, J.

McKee, J., *dissenting*. I dissent. The agreement, expressed by the terms of the contract upon which the action is founded, resulted in a promise by the defendants, jointly and severally, to pay to the plaintiff's assignor, upon the affirmance of a judgment from which an appeal was taken, or upon the dismissal of the appeal, the value of the use and occupation of the tract of land for which recovery had been had, from the day of the taking of the appeal until the surrender of possession of the land; and thereby the promisors became bound to pay an ascertainable sum of money, namely, the value of the use and occupation of the land between two specified and certain dates, upon the happening of a certain event. When the event happened the promisors became bound, by their contractual obligations, to pay the sum of money as an entirety, and not otherwise; and a cause of action accrued in favor of the promisee to enforce that obligation. *De Castro v. Clarke*, 29 Cal. 17; *Crane v. Weymouth*, 54 Cal. 476. The contract out of which the obligation arose being an express contract, it furnished the limits of the rights of the respective parties, and none others could be implied. The single object of the contract was the payment of an ascertainable sum of money. The obligation to pay was therefore indivisible; and as an indivisible obligation it cannot be carved into several causes of action. That would be making a new contract for the parties, to which they did not assent. As the cause of action accrued on the thirtieth of January, 1872, and the action in hand was not commenced until the seventh of September, 1876, it was therefore barred by the statute of limitations. But, it is urged, possession of the land was not surrendered within the time of the statute of limitations. Nevertheless, upon the affirmance of the judgment, there not only accrued an enforceable cause of action for the value of the use and occupation of the land, but also an enforceable remedy for the recovery of its possession by a writ of restitution, which was issuable at any time within the statute of limitations. Before that was done, however, the principal obligor in the present action, who had possession, enjoined, by a suit in injunction, the plaintiff, in the judgment from which the appeal was taken, from issuing a writ of restitution upon the judgment after its affirmance. But assuming that, as a fact, the possession was thenceforward held by him under a new contract, namely, the undertaking given in the injunction suit, and for any possession maintained under that contract the parties to it were liable; but the parties in this action were not parties to it, and therefore they are not bound by it.

66 Cal. 3

In re CARILLO. (No. 7,788.)

Filed October 1, 1884.

JURISDICTION—CRIMINAL PROSECUTION—JUSTICE OF THE PEACE—SAN JOSE.

The justice's court of the city of San Jose has concurrent jurisdiction with the police justice of that city to try and determine a criminal action for one of the public offenses enumerated in section 115 of the Code of Civil Procedure, charged to have been committed within the corporate limits of said city.

In bank. Appeal from the superior court of Santa Clara county.
D. W. Herrington, for appellant.

S. J. Hinds and *Wm. L. Gill*, for respondents.

McKEE, J. The question arising out of the record in this case is whether the justice's court of the city of San Jose has jurisdiction to try and determine a criminal action for one of the public offenses enumerated in section 115 of the Code of Civil Procedure, charged to have been committed within the corporate limits of said city.

By section 1, art. 6, and section 5, art. 11, of the constitution of 1879, it was ordained as follows:

"The judicial power of the state shall be vested in the senate, sitting as a court of impeachment, in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may establish in any incorporated city or town, or city and county.

"The legislature, by general and uniform laws, shall provide for the election or appointment in the several counties * * * and such other county, township, and municipal officers as public convenience may require, and shall prescribe their duties and fix their terms of office."

By a general law relative to courts of justice and various officers connected therewith, passed April 1, 1880, (St. 1880, p. 63,) the legislature, in carrying out the commands of the constitution, provided for the establishment and organization of justices' courts in incorporated cities and towns, and in townships within the several counties of the state, and for the establishment of a police court in each of the incorporated cities, and counties, cities, and towns, of the state, and prescribed the jurisdiction and powers of said courts. Articles 2 and 3, cc. 5 and 6, St. 1880. The judicial power of every city was vested in a police court, (section 121, Code Civil Proc.; section 4355, Pol. Code,) for which a police judge was to be elected, to hold office for a term to be fixed by the common council. Section 4370, Pol. Code. And there was granted to the court exclusive jurisdiction, within the corporate limits of the city, of the subject-matters enumerated in sections 4426, 4427, *supra*. At the time of the passage of this general law, and of the adoption of the constitution under which it was framed, the city of San Jose was administering its local affairs under a charter which had been granted to her in the year 1874. St. 1873-74, p. 395. The constitution declared that "cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws." Section 6, art. 11, Const. The city itself and the

charter of the city were therefore subject to the jurisdiction of the general law of 1880, by which a police court was established for the city; but, so far as appears by the record before us, or otherwise, no police judge has been elected for the city, and no police court has been organized under the law.

This being the case, the charter of the city as to the judicial power of the city remained in full force, (*Desmond v. Dunn*, 55 Cal. 242; *Wood v. Board of Election Com'rs*, 58 Cal. 561,) and by the provisions of the charter there was established a police court for the city. Sections 48 and 49 of the charter declare: "The judicial powers of the city are vested in a municipal court, the presiding officer of which is styled a police justice." But the charter contains no provision for the election or appointment of such an officer. It, however, declares justices of the peace of San Jose township and the mayor of the city competent to discharge all the duties of the office and to hold a police justice's court. Sections 48, 49, *supra*. The mayor of the city is, therefore, by the charter *ex officio* police justice, and authorized to hold a police court for the city; for "the term 'police court,' as used in the Penal Code, includes police judges' courts, police courts, and all courts held by mayors or recorders in incorporated cities or towns." Section 1461, Penal Code. But the police court of the city of San Jose is not the police court established by the legislature by the general law of 1880, which provided for the organization of a police court in every incorporated city by the election of a police judge; and gave to it, within the boundaries of the city in which it was established, exclusive authority of the subject-matters of its jurisdiction. The legislature, in the exercise of its discretion, might have made the mayors of incorporated cities *ex officio* judges, but it did not. The police court of San Jose is, therefore, a charter, not a statutory court, and the mayor of the city, as an *ex officio* police justice, is a charter judicial officer, with such judicial powers as the charter confers. These are: "Such jurisdiction and authority as is conferred by law upon justices of the peace in all criminal matters, where the crime may have been committed within the corporate limits of said city, and for all violations of city ordinances." Section 49, *supra*. But the jurisdiction of justices' courts over criminal matters is not exclusive. The charter declares that justices of the peace for San Jose township are competent to discharge all the duties of police justice for the city. The jurisdiction of the two courts is, therefore, under the charter, concurrent. Whence it follows that the appellant, as a city justice of the peace, had authority to try and determine the criminal commenced in his court, and the judgment prohibiting him from exercising his jurisdiction is erroneous.

Judgment reversed and cause remanded.

We concur: MYRICK, J.; SHARPSTEIN, J.; MORRISON, C. J.; THORNTON, J.

68 Cal. 9

HOME & LOAN ASSOCIATES v. WILKINS. (No. 8,320.)

Filed October 3, 1884.

MORTGAGE—FORECLOSURE—DECREE.

In an action to foreclose two mortgages, each of which is on a separate and distinct parcel of land, the decree should be for the sale of each parcel to satisfy the sum for which it was separately mortgaged, not for the sale of both parcels to satisfy the aggregate sum due.

Department 2. Appeal from the superior court of the city and county of San Francisco.

E. A. Lawrence, for appellant.

J. R. Brandon, for respondent.

By THE COURT. This action was brought to foreclose two mortgages, each of which was on a separate and distinct parcel of property. The decree is for the sale of both parcels to satisfy the aggregate sum due on both mortgages. In that regard the decree is erroneous. Each parcel should be sold to satisfy the sum for which it was separately mortgaged.

Cause remanded, with directions that the decree be modified as above suggested.

Cal.Rep. 1-4 P.—53

SUPREME COURT OF CALIFORNIA.

2 Cal. Unrep. 381

PEOPLE v. CARLETON. (No. 20,012.)

Filed October 2, 1884.

1. EVIDENCE—VERDICT.

Evidence *held* insufficient to justify the verdict.

2. CRIMINAL LAW—CHARGE TO JURY.

Where the charge, taken as a whole, is as favorable as the circumstances required, the judgment will not be disturbed.

3. WITNESS—EXAMINATION OF DEFENDANT.

Where questions put to the defendant when on the witness stand elicited only favorable answers, and no attempt was made to contradict him, he could not have been prejudiced by such examination.

Department 2. Appeal from the superior court of the county of Santa Clara.

Defendant in this case was charged with burglary, and after trial convicted. An appeal from the judgment of the trial court was taken on the grounds stated in the opinion.

Lamar & Layson, for appellant.

J. H. Campbell, for respondent.

By THE COURT. We think the evidence sufficient to justify the verdict. The charge, as a whole, seems to have been as favorable to the defendant as the circumstances required. The defendant's case could not have been prejudiced by the questions put to him, when on the witness stand, by the district attorney. The answers were all favorable to the defendant, and no attempt was made to contradict him.

Judgment and order affirmed.

2 Cal. Unrep. 382

PEOPLE v. WONG CHOW. (No. 10,998.)

Filed October 3, 1884.

JURY—INSTRUCTIONS—PRACTICE.

Where the evidence warrants an instruction suggesting a theory not presented by any other instructions given, it is the duty of the court to give the same at the request of one of the parties.

Department 2. Appeal from the superior court of the city and county of San Francisco.

The defendant was charged with assault with intent to commit rape. The usual instructions defining the crime, etc., were given.

The defense then requested the court to instruct the jury that if defendant did not intend or attempt to have carnal intercourse with the child, but simply placed himself in close proximity to her for the purpose of satisfying his depraved taste, the offense did not constitute an assault with intent to commit rape. The instruction was refused. Defendant appealed.

T. H. Riordan, for appellant.

Atty. Gen. Marshall, for respondent.

BY THE COURT. The eleventh instruction which the defendant requested to be given, and the court refused to give, to the jury, suggested a theory of the case which was not suggested by any of the instructions given, and we think the court erred in refusing to give it. The evidence, in our opinion, entitled the defendant to have that instruction given.

Judgment and order reversed, and cause remanded for new trial.

69 Cal. 6

GLADDING and others v. INSURANCE Co. (No. 7,542.)

Filed October 2, 1884.

1. FIRE INSURANCE—CONDITIONS IN POLICY—INCREASE OF RISK.

A condition in a fire insurance policy, that an increase of risk shall avoid the policy, is part of the contract itself, and if it is stipulated that such condition can only be waived by indorsement on the policy, it then cannot be waived in any other manner.

2. EVIDENCE—FINDINGS.

Findings held not supported by the evidence.

Department 2. Appeal from the superior court of the city and county of San Francisco.

A. W. Thompson, for appellants.

Fox & Kellogg, for respondent.

SHARPSTEIN, J. The finding that the hay which was in a shed near the building destroyed by fire was not stored there by the plaintiffs or with their consent, but was stored there with the knowledge and consent of the authorized agent of the defendant, and that the increase of risk occasioned thereby was with the knowledge and consent of the defendant, is attacked on several grounds, some of which we think to be well founded.

1. A witness for plaintiffs testified that he stored the hay in the shed, and that before doing so he applied to plaintiffs for permission, and was told by one of them that he would not consent unless witness obtained the consent of Mr. Kinney, (defendant's agent.) If he consented, witness could put the hay in. He says he saw Kinney, and was told by him "to go on and put it in." Thereupon witness stored the hay in the shed. This evidence is not contradicted, and, being

introduced by plaintiffs, we may assume, as against them, its entire truthfulness. The finding that the hay was not stored in the shed with the consent of the plaintiffs is clearly at variance with the fact of their having consented to its being so stored if Kinney would consent.

2. There is a stipulation in the policy that it shall be void "if the risk be increased by any means," and another that "the use of general terms, or anything less than a distinct, specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein."

It is alleged in the answer that the risk was materially increased by storing hay in said shed. The court should have found whether it was or not. There was some evidence which tended to prove that it was. If any effect is to be given to the clause last above quoted from the policy, the finding that the hay was stored "with the knowledge and consent of the authorized agent of the defendant" is not sufficient to constitute a waiver of the preceding clause, that "if the risk be increased by any means" the "policy shall be void." That finding has no other support than is afforded it by evidence that when the plaintiffs were asked to consent to the storage of hay in the shed, they told the applicant that if Kinney would consent they would, and that Kinney was at that time defendant's local agent at Oakland. The powers of such an agent are nowhere stated. He was not the agent through whom the application for insurance was made, and does not appear to have had any connection with the matter before his consent to the storage of the hay was asked and obtained. The authority to consent to an increase of the risk was probably inferred from the fact that he was the local agent of the company in the city where the loss occurred.

As to who should have indorsed on the policy a consent to an increase of risk in order to have it constitute a waiver of the condition that if the risk was increased the policy should be void, the instrument is silent. But it explicitly declares that unless so indorsed it shall not be construed as a waiver of any written or printed condition or restriction contained in the policy. Apparently, the mode is the measure of the power. If so, no officer of the company was authorized to consent to an increase of the risk in any other than the prescribed mode. We do not doubt the competency of the parties to stipulate that no condition or restriction contained in the policy should be waived except by indorsement on it; and that they did so stipulate is too clear to admit of doubt.

The condition that if the risk was increased the policy should be void, entered into and formed a part of the contract of insurance, and we know of no case in which it has been held that an express stipulation that such condition should not be waived except by indorsement on the policy, could be waived in any other way. The furthest that any court has gone, so far as we are advised, was to hold that

this did not apply to stipulations which were to be performed after a loss had occurred, such as giving notice and furnishing preliminary proof of the loss. *Franklin F. Ins. Co. v. Chicago Ice Co.* 36 Md. 102. Judgment and order reversed.

We concur: MYRICK, J.; THORNTON, J.

66 Cal. 15

IRVING v. CUNNINGHAM. (No. 9,142.)

Filed October 8, 1884.

1. WRITTEN CONTRACT—PAROL EVIDENCE TO CONTRADICT—EQUITY.

In an action at law, parol evidence is not admissible to contradict or vary the terms of a written contract. When the writing does not substantially express the intention of the parties to it, it is only by the proper action in a court of equity, to correct and reform it, that such evidence will be admitted to conform the contract to the real intention of the parties.

2. GRANT—FAULTY DESCRIPTION IN CONVEYANCE.

Where the description in a conveyance is true in part, but not in every particular, so much of the description as is false must be rejected, and the instrument will take effect if a sufficient description remains to ascertain the property intended to be conveyed.

In bank. Appeal from the superior court of Alameda county.

Jas. McCabe, Mich. Mullany, and Elliot J. & J. H. Moore, for appellants.

Henry P. Irving and Tully R. Wise, for respondents.

SHARPSTEIN, J. The principal controversy in this case is as to the northern boundary of the tract conveyed by Jose Domingo Peralta to McAllister and others, on August 16, 1853. In the deed, "the northern side line" is stated to be "a line drawn from a point two hundred varas south of a house occupied by a squatter, Espejo, and passing to a point at a small creek about two hundred varas south of the house now occupied by said Domingo with his family, and thence north-eastwardly in a straight line to the top of the mountains."

As to where two of the monuments—the houses of Espejo and Domingo—stood, there is no dispute. But the defendants offered to prove that there was not, before nor at the date of the said deed, a small creek about 200 varas south of the house of said Domingo, and that it was 1,850 varas from said house to the nearest creek in that direction. In connection with that offer the defendants offered to prove other facts having a tendency to show that the grantor supposed the reference to a creek about 200 varas south of his house was really to the one 1,850 varas south of it. If such had been the fact, the demanded premises would not have constituted any part of the tract conveyed by said deed. The offer was rejected, and the defendants' counsel insist that in rejecting it the court erred. If a

written contract does not substantially express the intention of the parties to it, a court of equity will, in a proper action, correct or reform it so as to make it conform to the real intention of the parties. But it is only in such an action that parol evidence is admissible to contradict or vary the terms of a written contract. This being an action at law, the rule which excludes parol evidence, when offered to contradict or vary the terms of a written contract, must be observed. If there had been a small creek about 200 varas south of the house occupied by the grantor, the evidence offered and rejected would have been clearly irrelevant and immaterial. If there was no small creek about 200 varas south of his house, or nearer in that direction than 1,850 varas, the case is one in which the description is true in part, but not true in every particular, and so much of the description as is false must be rejected; and the instrument will take effect if a sufficient description remains to ascertain its application. 1 Greenl. 301. If the words "at a small creek" be omitted from the clause we are considering, enough will remain to show plainly the intent. The words, exclusive of the *falsa demonstratio*, are sufficient of themselves to describe the property intended to be conveyed.

We think the circumstance of there having been a small creek at the distance of 1,850 varas south of the grantor's house is altogether immaterial. The deed must be construed as it would be if there had never been a small creek in that direction from his house. It is legally incredible that the grantor could have had that creek in his mind when referring to one about 200 varas south of his house. The description is not ambiguous. If there was a small creek about 200 varas south of the grantor's house, the description is correct in every particular. If there was no such creek in that direction nearer than 1,850 varas of his house, the reference to "a small creek" is of no manner of effect. In either view of the case the ruling of the court was correct.

Judgment and order affirmed.

We concur: MCKINSTRY, J.; ROSS, J.; MYRICK, J.; MORRISON, C. J.; THORNTON, J.

66 Cal. 10

BAILEY v. BOARD OF SUP'RS OF SAN JOAQUIN CO. (No. 9,734.)

Filed October 8, 1884.

CONSTITUTIONAL CONSTRUCTION—JUSTICES OF THE PEACE—TERM OF OFFICE.

The act of 1880, fixing the terms of office of justices of the peace at two years, is constitutional.

In bank. Appeal from an order of the superior court of San Joaquin county, refusing to issue a writ of mandate to compel the board of supervisors to call an election for justice of the peace.

J. A. Hosmer and *S. L. Terry*, for petitioner.

T. I. Bergin and *C. L. Weller*, for respondent.

By THE COURT. We are of opinion that the act of 1880, (St. 1880, p. 35, amending Code Civil Proc. § 110,) fixing the terms of office of justices of the peace at two years from the first day of January next succeeding their election, is constitutional, and that these officers are to be elected this year.

Let the writ issue as prayed for.

SUPREME COURT OF CALIFORNIA.

2 Cal. Unrep. 383

PEOPLE v. ABBOTT. (No. 10,965.)

Filed October 6, 1884.

1. CRIMINAL LAW AND PROCEDURE—JUROR—EXCEPTION TO ALLOWANCE OF CHALLENGE.

No exception can be taken to the decision of a court *allowing* a challenge. A person summoned as a juror, who entertains conscientious scruples against finding a man guilty of a crime for which he would be hung, must neither be permitted nor compelled to serve as a juror.

2. SAME—DYING DECLARATIONS—ADMISSIBILITY OF.

Declarations made by deceased *held* to have been made under a sense of impending death, and therefore admissible as dying declarations.

3. CONFESSIONS—ARREST.

Evidence of confessions made by a defendant while under arrest are admissible, if voluntarily made; the fact that defendant was under arrest not necessarily proving that the declarations were involuntary.

4. SAME—CONDUCT, ACTS, ETC., ADMISSIBLE.

The conduct, acts, and expressions of a person accused of crime, at the time of his arrest, are admissible against him.

5. SAME—WITNESS—FORMER CONVICTION OF FELONY—PROOF.

Former conviction of felony may be shown by the examination of the witness, or by record of the judgment, and questions asked of the defendant, when testifying on his own behalf, as to such fact, are proper.

6. SAME—INSTRUCTIONS—MURDER—MALICE.

Instructions on the law of murder and malice, in the language of sections 187, 188, of the Penal Code, are sufficient.

7. SAME—UNLAWFUL ACT—PRESUMPTION—BURDEN OF PROOF.

When an act is proved to have been done by the accused, if it be an act in itself unlawful, the law in the first instance presumes it to have been intended, and the proof of justification or excuse lies on the defendant to overcome this presumption.

8. SAME—DYING DECLARATIONS—JURY JUDGES OF CREDIBILITY OF.

Where dying declarations have been admitted as evidence, the question of their credibility comes within the province of the jury, and they are to give to them such credit as, on the whole, they may think them entitled to.

Department 1. Appeal from the superior court of the city and county of San Francisco.

John D. Whaley, for appellant.

The Attorney General, for respondent.

MCKEE, J. The defendant having been convicted of murder in the first degree, and sentenced to imprisonment for life, appeals from the judgment, and an order denying a motion for a new trial.

1. In impaneling the trial jury the court allowed certain challenges, taken by the district attorney, to two of the panel of jurors, for implied bias, upon the ground that each of them entertained such conscientious scruples as would preclude him from finding the defendant guilty. The challenges were made upon the testimony of the jurors given during their examination as to their qualifications to sit as trial jurors. When taken, the defendant's counsel "denied the

facts;" and the court, upon the testimony of the jurors previously given,—none other having been offered after the denial of the facts,—allowed the challenges and excluded the jurors. It is contended that the allowance of the challenges was erroneous, because there was no trial of the issue raised by the denial, and because the testimony of the jurors was insufficient. Section 1078 of the Penal Code provides: "If the facts are denied, the challenge must be tried by the court." But there was substantially a trial. The testimony of the jurors was taken before the judge himself, and the question raised by the denial of the defendant was submitted to the court for decision upon that testimony; for, after the denial of the facts, the defendant did not re-examine the jurors, nor offer any additional testimony; and as the question was practically submitted, by counsel for the people and for the defendant, upon the testimony before the court, the court had the right to, as it did, decide it without requiring the jurors to repeat themselves. The decision rendered was sustained by the evidence; for one of the jurors answered, substantially, that in a clear case of willful and deliberate murder he would be, as a juror, in favor of imprisonment for life, but opposed to hanging. And the other, that he had to a "certain extent" conscientious scruples against finding a man guilty of a crime for which he would be hung. A person summoned as a juror, who entertains such conscientious opinions, must neither be permitted nor compelled to serve as a juror. Section 1074, Penal Code.

2. At the trial of the case the court admitted in evidence, as dying declarations, certain statements of the deceased. The statements were that the defendant, who was taken after his arrest to the bedside of the wounded man, was "the man who cut him with a knife, and that he had no cause for it whatever." It is contended that it was error to admit these statements, because it was not proved they were made under a sense of impending death. Dying declarations are inadmissible unless the declarant believed that death was impending. If at the time of the declarations he has any expectation or hope of recovery, however slight it may have been, and though death ensued soon afterwards, the declarations are inadmissible. 1 Greenl. Ev. 184. Under that rule, we held, in *Hodgdon's Case*, 55 Cal. 72, certain dying declarations inadmissible, because, while the declarant, at the time of making the declarations, expressed herself as believing she would die, yet she also expressed the thought that she might recover, and therefore she had not abandoned the hope of recovery. In *Taylor's Case*, 59 Cal. 640, there was nothing in the circumstances of the case, or the expressions of the declarant, to indicate that he thought death was inevitable.

In the case in hand the evidence showed that the deceased died on the twenty-third of May, 1883, of *traumatic peritonitis*, caused by a knife-wound inflicted by the defendant on the twentieth of May, 1883. After receiving the wound, the deceased was taken to the receiving hospital. He suffered great pain. His medical attendant testified

that such a wound was invariably fatal. And, although encouraged by those around him, the wounded man frequently expressed himself as follows: "I have got my death wound. I think I am going to die. I believe I am going to die from the wound;" and he requested his wife to be sent for so that he might at once settle his affairs. His wife came, and was with him every day till he died; and she testified that "he said he was afraid he would never recover." The circumstances of the dangerous nature and character of the wound, the physical condition of the wounded man as shown by his sufferings, and of his mental condition, as indicated by his expressions, justified the inference drawn by the court that the declarant was conscious of impending death at the time of the declarations. The declarations were properly admitted in evidence. *People v. Sanchez*, 24 Cal. 17. Besides, the declarations were made in the presence of the defendant, who did not deny them, and the defendant had, before he was brought into the presence of the wounded man, confessed the truth of the fact contained in the declarations. The confession of the defendant and the declarations of the wounded man, made in the presence of the defendant, were made within two hours after the stabbing, and both were admissible as part of the *res gestæ*. The confession was this: "I don't deny I cut the son of a bitch to kill him, and if he ain't dead, I hope he will die." It was objected that this confession was extorted from the defendant by force and threats, but the evidence shows it was voluntarily made at the time of his arrest, and before the officer had time to speak to him upon the subject, and when he did make it the officer cautioned him about volunteering any statement of that kind, as it would have to be repeated at his trial, to which he answered "he did not care." There was, therefore, no error in admitting the confession and declarations.

3. Nor was there any error in admitting evidence tending to prove that the defendant, immediately after making the confession, became turbulent in his conduct, resisted the officer, and refused to deliver up the knife with which he had done the stabbing for which he was arrested. The conduct, acts, and expressions of a person accused of crime, at the time of his arrest, are always admissible in evidence against him.

4. The questions asked by the district attorney on cross-examination of the defendant, who testified as a witness in his own behalf, were proper. Former conviction of a felony may be shown by the examination of the witness, or the record of the judgment. Section 2051, Code Civil Proc.

5. In the charge of the court we find no prejudicial error. The instructions are not contradictory. The law of murder and malice was correctly expounded in the language of sections 187, 188, Penal Code; and the court added: "In its legal sense malice does not mean mere hatred and ill-will, but denotes an intent to do an unlawful act, without legal justification or excuse. * * * When an unlawful killing is proved, malice will be presumed, and the burden of proof is on

the defendant to show the absence or want of malice." Exception was taken to the last clause of the instruction. But the Code (subdivisions 2, 3, § 1963, Code Civil Proc.) declares that a person intends the ordinary consequence of his voluntary act, and that an unlawful act was done with an unlawful intent. And the effect of these statutory rules of evidence is that when the act is proved to have been done by the accused, if it be an act in itself unlawful, the law in the first instance presumes it to have been intended, and the proof of justification or excuse lies on the defendant to overcome this legal and natural presumption. *People v. Harris*, 29 Cal. 682.

6. The instructions to the jury upon the subject of the dying declarations, which had been admitted in evidence, were favorable to the defendant, and were properly given. After the admission of such evidence the question of its credibility remains for the consideration of the jury. It is their province to weigh all the circumstances under which the declarations were made, including those already proved to the judge, and to give to the declarations such credit as, upon the whole, they may think them entitled to. 1 Greenl. Ev. pp. 185, 186. Judgment and order affirmed.

I concur: Ross, J.

McKINSTRY, J., (*concurring*.) I concur in the judgment.

1. Appellant contends the court erred in allowing a challenge on the ground of implied bias to certain jurors. But no exception can be taken to the decision of the court allowing a challenge. Penal Code, 1170.

2. Appellant urges it was error on the part of the judge below to deny defendant's motion to examine other witnesses as to the condition of deceased at the time certain declarations, alleged to be dying declarations, were made. But the judge, being satisfied that the declarations were made when deceased was under a sense of impending death, was not required, upon the mere suggestion of defendant's counsel that other persons *might* know something of the condition of deceased, to postpone further proceedings until they could be brought in for examination. If defendant had offered to prove by any named witness that deceased, when he made the declarations, was not or did not believe himself *in extremis*, the point now made would have been presented by the record.

3. It is insisted the evidence did not show that deceased had abandoned every hope of recovery when the declarations were made. But the evidence sustains the finding of the court in that regard.

4. The court did not err in admitting evidence of the fact that defendant remained silent when deceased said "that is the man who cut me," for his silence was some evidence that the statement was true. Nor in admitting evidence of defendant's declarations when he was arrested; the fact that he was under arrest not necessarily proving that the declarations were involuntary. Nor in permitting the

prosecution to put in evidence the pocket-knife of defendant, even if it be admitted it was taken from him by force.

5. Appellant claims error in that the court overruled his objections to questions put to the witness James Brown, and in "compelling" the witness to answer them. The witness was asked, in effect, if he had been convicted of certain felonies under other names than Brown. The objections were that the evidence called for was incompetent, irrelevant, and immaterial. The witness did not decline to answer on the ground that his testimony would tend to degrade him, but answered voluntarily. The evidence was not irrelevant nor immaterial. It was not incompetent. Code Civil Proc. 2051.

6. There was no material error in the portions of the judge's charge referred to in appellant's points. Conceding the court erred, after having held that the deceased was thoroughly convinced of his impending dissolution, and admitted the declarations, in permitting the jury to reject the declarations, if *they* should believe deceased did not think he was dying, the error could not have prejudiced defendant, since the declarations were adverse to him.

(66 Cal. 10)

PEOPLE v. JORDAN. (No. 10,905.)

Filed October 8, 1884.

1. CRIMINAL LAW AND PROCEDURE—RECORD ON APPEAL—CORRECTION BY AFFIDAVITS.

It is not competent to correct the record of the court below by affidavits. If the record does not speak the truth, it should have been corrected in a proper proceeding in the court below.

2. SAME—INDICTMENT—OBTAINING MONEY ON FALSE PRETENSES.

To constitute the offense of obtaining money or property under false pretenses, four things must concur, and four distinct averments must be proved: (1) There must be an intent to defraud; (2) there must be an actual fraud committed; (3) false pretenses must be used for the purpose of perpetrating the fraud; (4) the false pretenses must be the cause which induced the owner to part with his property. An indictment containing all these essential averments, substantially, is sufficient.

In bank. Appeal from the superior court of the city and county of San Francisco.

The Attorney General, for appellants.

John M. Lucas, for respondent.

MORRISON, C. J. The principal grounds on which defendant based his motion to dismiss the appeal have already been considered and overruled by the court. Opinion filed September 30, 1884, *ante*, 683.

But there is another ground, not heretofore considered, on which the defendant asks that the appeal in this case may be dismissed, and that is, because section 1240 of the Penal Code has not been complied with. That section provides that an appeal is taken by filing

with the clerk of the court a notice of appeal, and serving a copy thereof on the attorney of the adverse party. The contention here is that the notice of appeal, in the case now under consideration, was served on the adverse party one day before the same was filed in the office of the clerk. This fact defendant attempts to establish by affidavits. Without passing on the question as to what would be the effect of such a proceeding, if true, it is sufficient to say that the transcript shows a different state of facts, to-wit, that the notice was filed and served on the same day. It is not competent to correct the record of the court below by affidavits. If the record does not speak the truth, it should have been corrected in a proper proceeding in the court below, and its verity cannot be attacked in the manner attempted in this case. The motion to dismiss must be denied; and we will now consider the merits of the appeal.

The prosecution in this case is under section 532 of the Penal Code, which provides that "every person who knowingly and designedly, by false or fraudulent representations or pretenses, defrauds any other person of money or property, or who causes or procures others to report falsely of his wealth or mercantile character, and, by thus imposing upon any person, obtains credit, and thereby fraudulently gets into possession of money or property, is liable," etc. The above section, which is substantially copied from the English statute, and finds a place in the Penal Codes or criminal enactments of other states, was considered by the supreme court of Massachusetts in *Com. v. Drew*, 19 Pick. 182, and it was there held that to constitute the offense described four things must concur, and four distinct averments must be proved:

"(1) There must be an intent to defraud; (2) there must be an actual fraud committed; (3) false *pretenses* must be used for the purpose of perpetrating the fraud; and (4) the fraud must be accomplished by means of the false pretenses made use of for the purpose, viz., they must be the cause which induced the owner to part with his money."

And Mr. Bishop, speaking of this offense, says:

"In spite of somewhat varying terms, the essential elements of most of the statutes defining this offense are the same. And the indictment to cover them, as construed, must set out a pretense or pretenses, which it alleges to be false, and known to the defendant to be so, made to a person named, for the purpose of defrauding him or another, by means whereof he obtained from the defrauded person some specified thing of value of a sort included in the statutory inhibition. Herein the statutory words and phrases should be employed, and the facts be given with such minuteness and directness as to satisfy the common-law rule of pleading." 2 Bish. Crim. Proc. § 163.

If the indictment in this case is subject to the test laid down in the foregoing authorities, it will be found to contain all that is required in such an instrument. The indictment charges that the defendant, at a certain time and place therein mentioned, with intent to defraud Joseph Kreling of his property, did unlawfully, knowingly, and designedly, falsely pretend and represent to him that two certain

bonds which he (Jordan) then and there had and produced to said Kreling, each of which purported to be a bond of the Arizona & Nevada Railroad & Navigation Company, and each being a promise to pay James G. Fair, or the holder thereof, \$1,000, the same being duly signed and executed, (giving a copy thereof,) and did then and there unlawfully, knowingly, designedly, falsely, and fraudulently represent and pretend to said Joseph Kreling that each of said bonds was then and there, in said city and county of San Francisco, of the market value of \$650, and that any bank in San Francisco would lend that amount on each of said bonds; and further, that the road of said company issuing said bonds was in running order and was paying expenses; and the said Joseph Kreling then and there believing said false pretenses and representations, and being deceived thereby, was induced, by reason of such false pretenses and representations so made, etc., to loan and deliver, and did then and there deliver, to said Jordan, on the pledge and security of said bonds, the sum of \$1,365 in money. It is further charged that said money was secured and obtained by the defendant, unlawfully, knowingly, and designedly, to defraud said Kreling. The indictment then proceeds to deny the truth of the false and fraudulent representations and pretenses, charging that said bonds, at the time and place the same were pledged, had not any market value whatever; that it was not true that any bank in the city of San Francisco would loan any money thereon; and that the company issuing said bonds had no road that was in running order or that was paying expenses,—all of which facts the said Jordan then and there knew.

We cannot see in what respect the indictment is defective, and are of opinion that the court below erred in sustaining the demurrer thereto. It is true that the authorities may be somewhat conflicting, and that in many of them very nice and not entirely satisfactory distinctions are drawn between cases that are, and cases that are held not to be, within the statute; and, as was said by DEWEY, J., in the case of *Com. v. Norton*, 11 Allen, 267: "It may be difficult to draw a precise line of discrimination applicable to every possible contingency, and we think it safer to leave it to be fixed in each case as it may occur." But we have found no case that holds such representations as are charged in this case not indictable. The following principles and authorities may be cited in further support of the views herein expressed: A false pretense is defined to be "a representation of some fact or circumstance, calculated to mislead, which is not true." *Com. v. Drew*, 19 Pick. 179. What is said to be a fuller and practically better definition is the following: "A false pretense is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value." 2 Bish. Crim. Law, § 415. In the case of *Reg. v. Evans*, 8 Cox, Crim. Cas. 257, note to 2 Bish. Crim. Law, 235, it is said: "Had the prisoner

represented the note to be of £5 value, when she knew it was not of that value, and the jury had found the false pretense, and that the note was of less value than £5, to her knowledge, it would have been sufficient to sustain a verdict of guilty." In the case of *Com. v. Stone*, 4 Metc. 43, the supreme court of Massachusetts held that the passing of a bill of a broken bank at its nominal value by one who represents it to be of such value, yet knows it to be nearly if not quite worthless, is an indictable pretense under the statute, although the bill may be of some value. "A representation that a horse is sound by one who knows it not to be true, is within the statute and is indictable." *State v. Stanley*, 64 Me. 157.

The doctrine that, in the language of Russell, the pretense "need not be such an artificial device as will impose upon a man of ordinary caution, is fully established; at least, in the English courts. And the pretense need not be such as cannot be guarded against by common prudence." 2 Bish. Crim. Law, § 436. "It is substantially settled that any false representation, extending beyond mere opinion, concerning the quality, value, nature, or other incident of an article offered for sale, whereby a purchaser, relying on the representation, is defrauded, is a violation of these statutes." *Id.* § 447. "A mere opinion is not a false pretense; but any statement of a present or past fact is, if false." *Id.* § 454. "There need be only one false pretense; and although several are set out in an indictment, yet if any one of them is proved, being such as truly amounts in law to false pretense, the indictment is sustained." *Id.* § 418. A false representation that one Conlin was a liquor-dealer, doing business as such in Boston, was held to be within the statute. *Com. v. Stevenson*, 127 Mass. 449.

We have examined the numerous cases cited by the learned counsel for defendant, but find none of them going to the extent claimed. Other questions are made in the brief of defendant's counsel, but they do not properly arise. We have considered the only questions presented by the record on this appeal, and are of opinion that the judgment sustaining the demurrer appealed from should be reversed. It is so ordered.

We concur: ROSS, J.; MYRICK, J.; THORNTON, J.; MCKINSTRY, J.

MANSFIELD v. STERN. (No. 9,696.)

Filed October 8, 1884.

APPEAL—UNDERTAKING—JUSTIFICATION OF SURETIES.

Where the sureties to an undertaking on appeal are excepted to and fail to justify, a new undertaking cannot be filed in the court below, but the supreme court will make an order to operate as a *supersedeas* upon proper terms. *Hul v. Finnigan*, 54 Cal. 493, followed.

Department 2. Appeal from the superior court of the city and county of San Francisco.

Naphtaly, Freidenrich & Ackerman, for appellant.

Eyre & Frank, for respondent.

By THE COURT. On the authority of *Hill v. Finnigan*, 54 Cal. 493, the appellant is allowed to file within 20 days a bond in the sum of \$4,000, with sureties, to be approved by Hon. E. W. McKINSTRY, associate justice of this court; and, upon the filing of such bond, execution on the judgment in the court below be stayed pending the appeal.

66 Cal. 27

LE BRETON, Adm'r, etc., and others v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO and others. (No. 9,663.)

Filed October 10, 1884.

JURISDICTION—ADMINISTRATOR—TRUST.

The superior court of the county in which an administrator resides has jurisdiction of an action or proceeding brought against him to enforce a trust on both real and personal property.

In bank. Application for writ of prohibition.

Pillsbury & Blanding, for petitioners.

MORRISON, C. J. The petition of plaintiffs prays for a writ of prohibition against the superior court of the city and county of San Francisco, under section 1102 of the Code of Civil Procedure, which declares that such writ "arrests the proceedings of any tribunal, corporation, board, or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person." And the following section (1103) provides that the writ shall issue in all cases "where there is not a plain, speedy, and adequate remedy in the ordinary course of law."

The petition filed in the case is of very great length, but the important facts which it contains may be briefly stated as follows: On the first day of October, 1870, Juana M. Estudillo and others were indebted to Theodore Le Roy, John B. Felton, and others in the sum

of nearly \$450,000, of which amount there was due John B. Felton the sum of \$24,500, and to secure the same they, Juana M. Estudillo and others, executed to Le Roy a deed of trust on certain lands therein described, situated in the counties of Alameda, Santa Barbara, and San Luis Obispo, in this state, with power to sell said lands, collect the rents falling due thereon, pay the taxes, and to exercise various other acts of confidence and trust respecting said lands, not only for his own benefit, but for the joint benefit of himself and the other parties named in the deed as *cestuis que trust*.

The third article of the deed of trust made it the duty of the trustee to sell the lands conveyed to him; and by the fourth article he was directed to pay off the indebtedness specified therein. The said Le Roy entered upon the duties imposed by the trust deed, and in the course of the execution thereof commenced an action on the twenty-sixth day of September, 1874, in the district court of the then Third judicial district, against Juana M. Estudillo and others, and procured an order of the court for the sale of the trust property to pay the debts embraced in and provided for by the trust deed. In pursuance of said order of sale, the commissioners appointed by the court for that purpose proceeded to sell the trust property, at which sale Le Roy became the purchaser thereof, and deeds for the same were executed to him by the commissioners. But the amount for which the property was sold was not sufficient to satisfy the trusts provided for in the deed. Le Roy failed to pay the claim of Felton, or any part thereof, and departed this life in April, 1882. In the following May, the petitioner Edward J. Le Breton was appointed administrator of his estate. John B. Felton died in May, 1877, and in the following June his executor, Henry Barroilhet, and executrix, Katherine B. Felton, commenced the action complained of, and sought to be prohibited, in the superior court within and for the city and county of San Francisco. In the complaint in that action the foregoing facts, substantially, were set forth, and also the additional fact that Theodore Le Roy, and Edward J. Le Breton, his administrator, who was the defendant in the action brought by Barroilhet and Katherine B. Felton, had been in the possession of the lands and premises described in the deed of trust, and had received therefrom rents and profits amounting to \$140,000. The prayer of the complaint in the action against Edward J. Le Breton is that an account be taken between the plaintiffs and defendant of and concerning the said trust, and of the advances and acts of the said Theodore Le Roy; that the trusts be executed by selling the lands, premises, and property subject thereto; that the proceeds thereof be apportioned between the plaintiffs and the defendant in the proportions in which they may be entitled to the same; and that plaintiffs have and recover costs.

The only question which we have at present to consider in the case is one of jurisdiction. Has the superior court of the city and county of San Francisco the right to entertain jurisdiction of the proceeding

in the case of Barroilhet and Felton against Le Breton, administrator of the estate of Theodore Le Roy? It is claimed, on behalf of petitioner, that it has not, because it is a proceeding to enforce a lien on real estate, and, under section 5, art. 6, of the constitution, "all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon, real estate shall be commenced in the county in which the real estate, or any part thereof affected by such action or actions, is situated." It is admitted that the lands described in the deed of trust are situate out of the county of San Francisco; and if the action in question belongs to any one of the kinds named in the constitution, the superior court, where the action was brought, has no jurisdiction. But, on the other side, in support of the jurisdiction of the superior court, it is contended, in the *first* place, that the action is not of the kind named in the constitution; and, *secondly*, that if it does in part come within the language of the constitution, there is another part that does not fall within the constitutional provision. In other words, that the object of the proceeding is to reach personal property as well as realty, and that, in such case, there is concurrent jurisdiction created by law in the court of the county in which the defendant resides. We will notice briefly both of these points.

The proceeding is not based on a lien, neither is it a suit to enforce a lien on real estate, but it is a proceeding to enforce a trust on both personal and real property. In such a case the rule is that the trustee may be sued wherever he can be found. In the case of *Masie v. Watts*, 6 Cranch, 160, Chief Justice MARSHALL said:

"Upon the authority of these cases, and others which are to be found in the books, as well as upon general principles, this court is of opinion that, in case of fraud of trust or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree."

And this although the lands lie in a foreign jurisdiction. Perry, Trusts, 70, 71, 72. The suit was brought against the administrator in the county in which he resides, to enforce a trust, and we have no doubt the superior court of that county had jurisdiction.

In the second place, the suit is brought to reach personal property in the hands of the trustee, and *that fact* gave the court jurisdiction. In the case of *Black v. Black*, 27 Ga. 40, the court says:

"It is true that the object of the bill was to compel the defendant to convey to the complainant an interest in the unsold lots of the town of Oglethorpe, but it is equally true that another and probably a much greater object of it was to compel the defendant to pay over to the complainant his part of the profits made by the defendant from the sales of the sold lots of that town; and, in so far as this last was the object of the bill, the proper county for the bill was the county of defendant's residence, and in that county it was brought. There was then, at least, as much reason that the bill should be brought in the county in which it was brought, as there was that it should be brought in the other county—that in which the land lay. This being so, a court of equity of either county would have jurisdiction of the case."

To the same effect is the case of *Ashurst v. Gibson*, 57 Ala. 584, where it is said:

"Land must be the subject-matter, and the exclusive subject-matter, of suit, or the jurisdiction conferred by this act does not attach. Remedies must be pursued in the district of the residence of a material defendant, if land and personal property are the subject-matter of suit."

For these reasons, therefore, and on both of the grounds above considered, we think jurisdiction over the case attached to the superior court of the city and county of San Francisco.

We are of opinion that the writ should be denied; and it is so ordered.

We concur: MCKINSTRY, J.; MYRICK, J.; SHARPSTEIN, J.

66 Cal. 25

COUNTY OF MERCED *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA.
(No. 9,692.)

Filed October 10, 1884.

COUNTY BONDS—FORM OF—ACT OF 1883.

The act of March 14, 1883 (Pol. Code, 4048) prescribed the form of county bonds, and one to whom the county is indebted need not take the bonds of such county unless they are in conformity with that act.

In bank. Appeal from the superior court of Merced county.

John B. Mhoon, for appellant.

F. H. Farrer, for respondent.

MYRICK, J. The act of March 14, 1883, to establish a uniform system of county and township governments, section 25, subsec. 14, repealed section 4048, Pol. Code, at least so far as the latter required the bonds to refer to the Political Code, and directed that bonds should refer to it, (the act of 1883.) Without considering any question as to the validity of bonds reciting their issue under the Political Code, it is sufficient to say that the act of March 14, 1883, gives the form of the bonds, and the defendants should not be compelled to take them unless they are in conformity with that act. The former class of bonds might, perhaps, be good, as against the county, in the hands of a purchaser, but the defendants should not be compelled to take any risk. They are justified in standing on the form prescribed in the act of 1883.

Judgment reversed, and cause remanded.

We concur: MORRISON, C. J.; THORNTON, J.; MCKINSTRY, J.

SUPREME COURT OF CALIFORNIA.

(66 Cal. 17)

LAKE CO. v. SULPHUR BANK QUICKSILVER MIN. CO. (No. 8,057.)

Filed October 10, 1884.

1. TAXATION—DUTY OF ASSESSOR—ASSESSMENT OF REAL AND PERSONAL PROPERTY.

All property must be assessed to the *owner*. As to real property, a mistake in the name of the owner does not invalidate the tax. As to personal property, it must be assessed to the real owner or to unknown owners, and an assessment of such property to a named person, other than the owner, is absolutely void.

2. SAME—CORPORATE NAME—ABBREVIATION.

Where an assessment is made to a name which is evidently an abbreviation of the name of a certain corporation, but no evidence of the fact that such corporation is meant or known by such abbreviation is introduced, the court will not identify the name as an abbreviation of the name of such corporation, though an assessment to an abbreviation properly identified would be valid.

3. ASSESSMENT OF LANDS—SUFFICIENCY OF DESCRIPTION.

As to lands which have been sectionized by the government, it is a sufficient assessment, where the tract does not contain more than 640 acres, to describe such tract by stating the congressional subdivisions contained in it. A description which will in no way identify the land is insufficient.

4. LEVY OF TAXES—SUFFICIENCY OF ORDER—DOLLARS—CENTS.

Where the board of supervisors is required to fix the rate of taxation by cents, an order fixing the same by dollars and hundredths of dollars, indicated by a decimal point, is a sufficient compliance with the requirement.

5. ASSESSMENT ROLLS—DISPENSING WITH DUPLICATES—ORIGINALS AS EVIDENCE.

Under the act of 1880, providing that counties may dispense with duplicate assessment rolls, the effect is that the law which makes duplicate rolls *prima facie* evidence in such cases applies to the original rolls, and such originals are admissible and have the effect of such evidence.

6. DELINQUENT TAXES—INTEREST.

Two per cent. per month interest is allowed only from the third Monday of March, where taxes become delinquent.

7. SAME—COLLECTION—PERCENTAGE OF DISTRICT ATTORNEY.

Under existing statutes the district attorney of Lake county is entitled to recover a percentage on taxes collected by him.

8. JUDGMENT FOR TAXES—FORM OF.

A judgment for taxes for a gross sum, which fails to distinguish between the amounts due state and county, respectively, is not a judgment in sufficient form.

In bank. Appeal from the superior court of Lake county.

J. C. McCeney, D. M. Harrison, and Welch & Britt, for appellant.

R. W. Crump and Rutledge & McConnell, for respondent.

MCKINSTRY, J. 1. The assessment put in evidence shows property assessed to "Sulphur Banks Q. S. M. Co." Section 3807 of the Political Code provides: "No mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid." There is nothing in the language of the section to indicate that the clause quoted can be given effect only when an attempt is

made to enforce the *lien* for the tax. The effect of the clause in section 3807 is but to give a more enlarged operation to a rule already established. Prior to the adoption of that clause it had been frequently held that a defendant sued for a tax, assessed to "unknown" owners, could not be permitted to prove that the assessor might, with more diligence, have ascertained the real owner of the property. On behalf of the defendant in those cases it was urged that unless inquiry was permitted with respect to care and diligence of the assessor that officer would have it in his power entirely to neglect his duty, and assess to *unknown* owners property, the ownership of which he should use no effort to ascertain, or which he might even know to belong to a particular person. So, here, it is said that if he is allowed to assess the property to a person other than the real owner he may abuse the power. But the ascertainment of the name of the owner is a matter with respect to which the assessor has discretionary power, and his judgment or conclusion in regard to it is final, so far as the validity of the tax is concerned.

In the case before us the defendant was sued as the owner of the property assessed to the "Sulphur Banks Q. S. M. Co." If the defendant is not the owner of such property it had full opportunity to establish that fact, but it is not a defense to the payment of the taxes upon the *real estate* that the assessor mistook the name of the owner of it. Section 3807 of the Political Code, however, only declares that a mistake in the name of the owner of *real* property shall not avoid the tax. A portion of the taxes here sued for is upon personal property. We have further to inquire, therefore, whether the assessment of personal property is invalid. Unless we can take judicial notice that "Sulphur Banks Q. S. M. Co." is the equivalent or an abbreviation of "Sulphur Bank Quicksilver Mining Company," or unless there was evidence tending to prove that the corporation defendant was known by the name "Sulphur Banks Q. S. M. Co.," the assessment of the personal property cannot be upheld. Tax proceedings are *in invitum*, and, to be valid, must be in strict accordance with the statute. Without an assessment all subsequent proceedings are nullities, and in making the assessment the provisions of the statute under which it is to be made must be observed with particularity. *Cooley, Tax'n*, 259-260; *Moss v. Shear*, 25 Cal. 46; *People v. Mahoney*, 55 Cal. 288. The statute seems to require all property to be assessed to the owner. Pol. Code, 3650. So far as relates to *real* property a mistake in the name of the owner does not invalidate the tax, as we have seen above. Pol. Code, 3807. But with respect to personal property it would seem to be the duty of the assessor to assess it to the owner. Even, however, if section 3636 of the Political Code (which speaks only of absent owners) can be held to apply to an owner not absent, personal property must be assessed to the real owner, or to "unknown owners." An assessment of personal property to a named person, other than the owner, is absolutely void. *Smith v. Davis*, 30 Cal.

537; *Blatner v. Davis*, 32 Cal. 328; *Kelsey v. Abbott*, 13 Cal. 609; *People v. Whipple*, 47 Cal. 591; *Crawford v. Schmidt*, Id. 618.

"Sulphur Banks Q. S. M. Co., F. Fiedler, Agt.," is not the same thing as "Sulphur Bank Quicksilver Mining Company." We may conjecture, or very strongly suspect, that the assessor *meant* to assess the defendant as the owner of the personal property, but he did not assess the defendant. If the case showed that defendant had been usually known or was even sometimes called "Sulphur Banks Q. S. M. Co.," it may be conceded, for the purposes of this decision, that the assessment of the personal property to defendant would be good. See *People v. Sierra Buttes Q. M. Co.* 39 Cal. 514. But in the transcript before us there is no evidence that defendant was called, or called itself, by that name. It is plain we cannot identify the name to which the personal property was assessed as an abbreviation of the name of defendant, even if an assessment to an abbreviation would be valid. We are forced to the conclusion that the assessment of personal property cannot be enforced against defendant.

2. It is insisted by appellant that the assessment of real property is invalid because it departs from the requirements of section 3650 of the Political Code, which makes it the duty of the assessor to enter in his book, under an appropriate heading, "land by township, range, section or fractional section; and when such land is not a congressional division or subdivision, by metes and bounds, or other description sufficient to identify it, giving an estimate of the number of acres, (not exceeding in each and every tract six hundred and forty acres,) locality, and the improvements thereon. When any tract of land is situate in two or more school, road, or other revenue districts of the county, the part in each township or district must be separately assessed, together with the improvements thereon." It is claimed by appellant that the statute requires a separate assessment of each "section or fractional section," whenever the land has been surveyed into congressional subdivisions, and exceeds 640 acres in area. And appellant urges that the intent of section 3650 is made more apparent by the language used in section 3628: "Land shall be assessed in parcels or subdivisions not exceeding 640 acres each, and *tracts of land* containing more than 640 acres, which have been sectionized by the United States government, shall be assessed by sections or fractions of sections." It is said that in the face of the Code requirements *a tract* of 3,500 acres, sectionized by the government, has not been assessed in sections or fractional sections.

But the statement that the 3,500 acres constitute a single tract is not borne out by the record. There is no evidence of the fact. Nor does it appear that subdivisions exceeding in aggregate quantity 640 acres are assessed as a single tract. It is true, the W. fractional $\frac{1}{2}$ and the S. E. $\frac{1}{4}$ of section 5, township 13, range 7, containing 436 acres, is assessed with the whole of fractional section 6, in the same township and range, containing 133 acres. But the subdivisions thus

assessed as one tract contain together but 569 acres. So, also, fractional sections 1, 2, and 3, township 13, range 8, assessed as one tract, aggregate but 500 acres. Reading sections 3650 and 3628 of the Political Code, it would seem to be a sufficient assessment (at all events, where a tract does not contain more than 640 acres) to describe such tract by stating the congressional subdivisions contained in it. We think, however, the attempted description of "a tract of land entered by Frazier," in section 13, township 13, range 7, is hopelessly defective. This is neither a description by "township, range, section, or fractional section," nor is it a description by "metes and bounds," nor is it otherwise sufficient to identify the land.

3. The description, "W. fractional $\frac{1}{2}$ and S. E. $\frac{1}{4}$ of (mine) section 5, township 13, range 7, 436 acres, all of fractional section 6, township 13, range 7, 133 acres," is sufficient. It is, in effect, a statement that all of the subdivisions are a mine. As the assessment was good of itself, the oral testimony of the assessor did not prejudice any right of defendant.

4. It is contended by appellant that the order of the board of supervisors, dated October 4, 1880, is, as a levy of taxes, ineffectual. The order is in words and figures following:

"Ordered unanimously by the board of supervisors of Lake county, California, that they have this day fixed the rate of county and district tax to be levied and collected upon each \$100 of the assessed valuation of the property of the county of Lake, California, to raise the specific amounts required to be raised for the thirty-second fiscal year, 1880-81, as follows, to-wit:

State fund,	-	-	-	-	-	-	-	0.64
General county fund,	-	-	-	-	-	-	-	0.40
County school fund,	-	-	-	-	-	-	-	0.37
Salary fund,	-	-	-	-	-	-	-	0.25
General road fund,	-	-	-	-	-	-	-	0.50
County hospital fund,	-	-	-	-	-	-	-	0.08
Public building fund,	-	-	-	-	-	-	-	0.04 $\frac{1}{2}$
Bond fund,	-	-	-	-	-	-	-	0.12 $\frac{1}{2}$

Total state and county levy, 1880-81,	-	-	-	-	-	-	-	\$2.41
Wagon-road district fund, Lake county,	-	-	-	-	-	-	-	0.14
Old road district fund six, Lake county,	-	-	-	-	-	-	-	0.20

Total state, county, and district tax, 1880-81, - - - \$2.75"

(Signed by the members of the board.)

Section 3714 of the Political Code provides:

"The board of supervisors of each county must, on the first Monday of October, fix the rate of county taxes, designing the number of cents on each hundred dollars of property levied for each fund, and must levy the state and county taxes upon the taxable property of the county: *provided*, that it shall not be lawful for any board of supervisors of any county in the state to levy, nor shall any tax greater than fifty cents on each one hundred dollars of property be levied, and collected in any one year, to pay the bonded indebtedness, or judgment arising therefrom, of this state, or of any county or municipality in this state."

It will be observed the section just recited requires the supervisors to "fix the rate of county taxes, designating the number of cents on each one hundred dollars," etc. The order of the board of supervisors does fix the rate and designate the number of cents, etc., unless the omission of the word "cents" vitiates the order. But the sixty-four hundredths, for example, is undoubtedly intended to bear a relation to one hundred dollars, and it is a natural if not necessary interpretation to say that it is sixty-four one-hundredths of one dollar. The language of the order is to be referred to the power which the board were authorized to employ, and which they were attempting to employ,—a power to designate "the number of cents on each one hundred dollars." The cases in this state in which it has been held that figures in an *assessment* must be accompanied by a dollar-mark or other character showing what they represent, are not conclusive of the question now before us. The order, read in the light of the law, clearly indicates what is meant by the figures and *decimal points*.

5. Was the admission in evidence of the *original* assessment roll erroneous? The Political Code and the act of April 23, 1880, except so far as the former is impliedly repealed by the latter, are to be read together. The law, 1880, does not provide for the making of a duplicate assessment roll; 3732 of the Political Code requires the auditor to deliver a duplicate assessment to the tax collector, and the law of 1880 provides that a certified copy of *such* duplicate shall be *prima facie* evidence of the plaintiff's right to recover "in any action that may hereafter be commenced." Section 3738 of the Political Code authorizes the board of supervisors of any county, in their discretion, to dispense with the making or use of any duplicate assessment book, and in all cases where such duplicate assessment is referred to "it shall be lawful to use and consider the original assessment book in all the requirements of every part of *this Code* referring to the same," etc. An order to dispense with the duplicate was in fact made by the supervisors of Lake county. The words used in the act of 1880 are, "*the* duplicate assessment," and there can be no doubt these words referred to the duplicate provided for by the Political Code; but **the** same Code authorizes the duplicate to be dispensed with, and when dispensed with gives equal effect to the original. The law of 1880 was passed in view of the existing provisions of the Code, and it would seem too narrow a construction to say it did not make the original (when the duplicate is dispensed with) *prima facie* evidence.

6. The judgment allows 2 per cent. per month upon the amount of taxes, allowed from December 28, 1880. This is error. Manifestly, section 3803 of the Political Code refers to the "delinquent taxes" mentioned in the sections immediately preceding, and which remain unpaid until, the third Monday of March. Section 3797. In the case at bar the action was commenced on the second day of March.

7. Comparing the act of 1880 and sections 7 and 11 of the act "concerning county officers of Lake county," etc., (St. 1875-76, p.

599,) we think the district attorney was entitled to recover his percentage.

8. The judgment is irregular in that the judgment is for a gross sum, not distinguishing between the amounts due the state and county respectively. *Sacramento v. C. P. R. Co.* 10 Pac. C. L. J. 315, 316. It is not a judgment which can be construed sufficient in form. *Id.*

Judgment and order reversed, and cause remanded for a new trial.

We concur: SHARPSTEIN, J.; ROSS, J.; MORRISON, C. J.; MYRICK, J.

THORNTON, J., (*concurring.*) I concur in the judgment, and in the views expressed in the foregoing opinion, except that I think there was evidence that the corporation was known by the name by which it was assessed.

2 Cal. Unrep. 389

Ex parte FINLEY. (No. 20,033.)

Filed October 11, 1884.

HABEAS CORPUS—PRISONER PROPERLY IN CUSTODY.

A prisoner will not be discharged on *habeas corpus* where, from the return of the officer having him in custody, it appears that he is held under an information in due form charging him with forgery.

Application for discharge on *habeas corpus*.

C. B. Darwin, for petitioner.

MORRISON, C. J. Petitioner prays to be discharged on *habeas corpus*. It appears from the return of the officer having the defendant in custody that he is held under an information charging him with forgery. I do not deem it a proper exercise of authority to discharge the defendant, under the circumstances of the case.

Writ dismissed and prisoner remanded.

2 Cal. Unrep. 389

DONAHUE v. MARIPOSA LAND & M. Co. (No. 8,263.)

Filed October 15, 1884

PRACTICE—APPEAL—INDEX TO TRANSCRIPT—DISMISSAL.

Where no index is prefixed to the transcript, the court, under the rule, is authorized to dismiss the appeal.

In bank. Appeal from the superior court of the city and county of San Francisco.

v.4,no.21—56

Heydenfeldt, Brumagim & McAllister & Bergin, for appellant.
Winans, Belknap & Godoy and Doyle, Barber, Galpin & Scripture,
for respondents.

BY THE COURT. No *index* is prefixed to the transcript, which contains over 8,000 *folios*. Under the rule the court is authorized to dismiss the appeal, but the submission of the cause is set aside, with leave to appellants to prepare and print proper index, to be prefixed to each copy of transcript within 10 days.

66 Cal. 36

NICOLL v. NICOLL. No. 8,224.)

Filed October 21, 1884.

1. PRACTICE—CHANGE OF VENUE—TIME FOR DEMAND.

An affidavit of merits, and demand that trial be had in the proper county, must be filed when the defendant appears and answers or demurs. If filed before answer or demurrer it will be of no avail.

2. AFFIDAVIT OF MERITS—SUFFICIENCY WHEN MADE BY ATTORNEY.

The affidavit of the attorney of a party will be sufficient where it swears to merits, and shows an adequate excuse for its not being made by the party.

Department 2. Appeal from the superior court of the city and county of San Francisco.

Eyre & Frank, for appellants.

J. W. Freeman and Flournoy & Mhoon, for respondents.

BY THE COURT. The affidavit of merits, and demand that the trial be had in the proper county, which were filed before the defendant answered or demurred, were wholly inconsequential. To be of any avail such affidavit and demand must be filed when the defendant appears and answers or demurs. Code Civil Proc. 396. In this case we can only consider the order made on the motion, which was based upon the affidavit and demand filed at the time the defendant appeared and demurred. And if the affidavit of merits is sufficient, the order must be affirmed. The affidavit was made by one of defendant's attorneys. In *Johnson v. Lynch*, 15 How. Pr. 199, BACON, J., after reviewing cases decided before and since the adoption of the Code, said: "In view of these cases I think it must be conceded that the affidavit of the attorney of a party will be sufficient where it swears to merits, and shows an adequate excuse for its not being made by the party. Absence beyond seas or out of the state will usually be deemed sufficient." An examination of the cases has brought us to the same conclusion. *Bailey v. Taaffe*, 29 Cal. 423, does not hold the contrary. In that case the affidavit of the attorney was held to be insufficient in several respects, one of which was that no reason was given why the defendant himself did not make it. That of itself was a sufficient objection. In this case the affidavit states a sufficient

reason for defendant's not making it. The attorney who made it bases his belief that the defendant has a good and substantial defense to the action upon the merits on a statement of the case in writing made by defendant to said attorney, and on "the affidavits of the defendant filed in this cause." Under the New York rule it would have been sufficient on that point to have said: "From a statement of the case in this action, made to deponent by defendant, deponent believes," etc.

In the whole, we think the affidavit of merits sufficient. Order affirmed.

66 Cal. 33

LUKES v. LOGAN, Superior Judge. (No. 9,375.)

Filed October 21, 1884.

PRACTICE—NONSUIT — PAYMENT OF JURY FEES.

Where, in the trial of a civil cause, a nonsuit is granted and the jury discharged, the fees must be paid by the plaintiff, and until so paid no further proceedings shall be allowed in the case; the settlement of a bill of exceptions is a proceeding in the action.

Department 2. Application for writ of mandate to compel the respondent, a superior judge, to settle a bill of exceptions.

W. McCann and Tyler & Tyler, for petitioner.

J. M. Lesser, for respondent.

By THE COURT. The return shows that a jury was duly impaneled and sworn to try the case of *Lukes v. Bernheim et al.*, and that after the plaintiff had introduced evidence and rested, the defendants moved for a nonsuit, which was granted, and the jury was discharged by the court, which made an order that the fees of the jury be paid by the plaintiff. The plaintiff refused to comply with that order, and the court thereupon ordered that no further proceedings be allowed in the action until said fees were paid. The plaintiff prepared, and presented to the respondent for settlement, a bill of exceptions, which respondent refused to settle, on the ground that plaintiff had not paid said jury fees. Section 17 of an act entitled "An act to regulate fees of office," approved March 28, 1868, (St. 1867-68, p. 436,) provides: "If, in any trial in a civil case, the jury be for any cause discharged without finding a verdict, the fees of the jury shall be paid by the plaintiff, * * * and until they are paid no further proceedings shall be allowed in the case."

If the settlement of a bill of exceptions was a proceeding in the action, respondent was clearly justified in refusing to act. We do not doubt that the settlement of a bill of exceptions is a proceeding in an action, within the meaning of the statute.

Writ dismissed.

66 Cal. 34

HARNEY v. McLERAN. (No. 7,666.)

Filed October 21, 1884.

1. PLEADING—ISSUE JOINED—NONSUIT.

Where the allegations in a complaint are denied in the answer, and no evidence is introduced to support such allegations of plaintiff, a nonsuit may properly be granted.

2. SAME—OWNERSHIP—DENIAL ON INFORMATION AND BELIEF—DEMURRER.

In an action on an assessment for street-work, a denial on information and belief that defendant is the owner of the property assessed is sufficiently certain if no objection is taken thereto by demurrer.

3. PRACTICE—NONSUIT—FINDINGS.

Where a plaintiff is nonsuited, findings are not required.

Department 2. Appeal from the superior court of the city and county of San Francisco.

J. M. Wood, for appellant.

Wm. Leviston, for respondents.

BY THE COURT. There is no evidence to support the allegation of the complaint that the defendants, McLeran and Porter, were owners of the premises assessed for street-work, and if that allegation was denied in their answer, the motion for a nonsuit, as to them, was properly granted. The denial that McLeran was the owner of the premises, or any part thereof, is explicit. The ownership of Porter is not positively denied; but, while admitting that he claims to be the owner of an interest in the premises, the defendants allege that they have not any information or belief on the subject sufficient to enable them to answer the allegation of his ownership, and on that ground, solely, deny it. No motion was made to have this matter stricken out of the answer. But the appellant insists that the decision of the court on the motion for a nonsuit must be viewed as it would be if no attempt had been made to deny the ownership of Porter. None of the cases cited go to that length. *Harney v. Corcoran*, 60 Cal. 318, decides that if objection had been made to the filing of an amended answer with this clause in it, the court might in its discretion have sustained the objection. The denial of the ownership of Porter is not irrelevant. If not sufficiently certain, it might have been demurred to; and we think this was the plaintiff's proper and only remedy in this case. Where a plaintiff is nonsuited, findings are not required. *Reynolds v. Brumagim*, 54 Cal. 254.

Judgment and order affirmed.

66 Cal. 34

PELTRET v. FRANK. (No. 8,266.)

Filed October 21, 1884.

TRANSCRIPT ON APPEAL—PAPERS ADMISSIBLE.

Papers attached to a transcript, which are not part of the judgment roll, nor incorporated in the bill of exceptions, nor otherwise identified as having been used or considered on the hearing of any motion in the case, cannot be considered on appeal.

Department 2. Appeal from the superior court of the city and county of San Francisco.

This was a proceeding for foreclosure of a mortgage. Judgment was rendered for plaintiff, decreeing foreclosure and granting a writ of assistance. Subsequently, on motion, an order was made vacating judgment as to all minor defendants, and also recalling the writ of assistance theretofore issued. From these orders plaintiff appealed.

E. J. Linforth, for appellant.

Robinson, Olney & Byrne and *F. J. Castlehun*, for respondents.

BY THE COURT. Appeal from orders made after judgment. In addition to a copy of the judgment roll, the transcript contains what purports to be copies of affidavits and of the official reporter's notes of the oral evidence of two witnesses. These are not incorporated in a bill of exceptions, nor are they identified, by a certificate of the judge or otherwise, as having been used or considered on the hearing of any motion in the case. Under the circumstances we cannot consider anything except the judgment roll, and, as that discloses no ground for a reversal of the orders appealed from, they are affirmed. *Baker v. Snyder*, 58 Cal. 617; *Angell v. Delmas*, 60 Cal. 254; *Walsh v. Hutchings*, Id. 228; *White v. Longmire*, 11 Pac. C. L. J. 154.

Orders affirmed.

66 Cal. 31

SWEETLAND v. SHATTUCK. (No. 7,064.)

Filed October 21, 1884.

1. APPEAL—OBJECTIONS FIRST RAISED IN APPELLATE COURT.

Where no objection was made in the lower court to the introduction in evidence of a verbal agreement, it is too late on appeal to raise the objection that it was not in writing.

2. SAME—CONFLICTING EVIDENCE—AFFIRMANCE OF JUDGMENT.

Where the evidence is substantially conflicting, and no exception is taken to the instruction to the jury by the lower court, the judgment will be affirmed.

Department 1. Appeal from the superior court of the city and county of San Francisco.

T. J. Crowley and *Alex. Campbell, Jr.*, for appellant.

John M. Stanley, for respondent.

ROSS, J. Assuming that the agreement upon which the plaintiff relied for a recovery was required to be evidenced by writing, the plaintiff was permitted in the court below to give proof of the agreement without objection that it was not in writing. Such objection cannot be made here for the first time. 2 Reed, St. Frauds, §§ 540, 541, and authorities there cited.

The evidence upon which the verdict was based was substantially conflicting, and there were no exceptions taken in the court below to the instructions of the court.

Judgment and order affirmed.

We concur: MCKINSTRY, J.; MCKEE, J.

In re LASWELL, in Insolvency. (No. 9,115.)

Filed October 21, 1884.

JUDGMENT AFFIRMED—POINTS AND AUTHORITIES.

No points and authorities having been filed, and no error appearing, judgment affirmed.

Department 2. Appeal from the superior court of San Joaquin county.

This was a proceeding in insolvency. The insolvent having applied for a discharge, opposition to the same was filed on the ground that this insolvent had already received the benefit of another insolvent act within three years. On this ground an order was made refusing such discharge, from which order an appeal was taken.

Geo. E. McStay, for appellant.

J. B. Webster, for respondent.

BY THE COURT. We have not been aided by any brief or points and authorities on behalf of appellant. We see no error in the judgment appealed from. The judgment is therefore affirmed.

SUPREME COURT OF CALIFORNIA.

66 Cal. 39

BROWNE v. DEXTER. (No. 9,722.)

Filed October 21, 1884.

1. CITIZENSHIP—ALLEGIANCE—EXPATRIATION.

A natural-born citizen of the United States may renounce his allegiance to the country of his birth, and become a citizen of another state or kingdom, and the taking of the oath of allegiance to another country will make him a citizen of such country.

2. SAME—CHILD BORN ABROAD.

The child of one who has renounced his citizenship in the United States, and assumed allegiance to another power, born after such renunciation and assumption, is not a citizen of the United States, and therefore not entitled to registration as a voter.

Department 2. Application for a writ of mandate.

R. M. F. Soto, for petitioner.

Wright & Cormack, for respondent.

THORNTON, J. This is an application to compel the respondent to enter the name of petitioner on the great register of the county of Monterey as a voter. The grand-parents of petitioner were native-born citizens of the state of New York, and removed therefrom to Canada in 1835, taking with them their child, then 11 years of age, which child subsequently became the father of petitioner. The said father of petitioner, after attaining majority, took the oath of allegiance to the queen of Great Britain, voted, and held office. This oath was taken in January, 1858, before the birth of petitioner, which occurred in March, 1858. The petitioner and his father continued residents of Canada until their removal to this state, which occurred as follows: The petitioner, in September, 1883, became, and has continued to be, a resident of Monterey county, and the father, about February, 1884, became a resident of the same county.

We are of opinion that the taking of the oath of allegiance in January, 1858, by the father of the petitioner, was an act of expatriation and denationalization, and made him a citizen of a foreign country. By such act he renounced his allegiance to the United States. We have no doubt that he had a right when he took this oath to expatriate himself, to renounce his allegiance to the country of his birth, and to become a citizen of another state or kingdom. On this point we refer to the case *In re Look Tin Sing*, 21 Fed. Rep. 905, where the right of expatriation is discussed, and in the views there expressed concerning it we concur. That the act of taking the oath of allegiance made him a citizen of another country, is sustained by the admitted facts that he afterwards voted at public elections and held public offices in Canada. The petitioner having been born

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after his father became a citizen of a foreign country, is not within the provisions of the act of congress of February, 1855, or of section 1993 of the Revised Statutes of the United States. These provisions only apply to the children born out of the limits and jurisdiction of the United States before or after the passage of the enactments referred to, whose fathers were at the time of their birth citizens of the United States. It follows from the foregoing that the petitioner has never been a citizen of the United States, and therefore is not entitled to be registered as a voter.

The clause in section 2172 of title 30 of the Revised Statutes—"and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof"—should not, in our opinion, be construed as changing the rule prescribed in section 1993. It should be read and construed with the section last mentioned, that the father of such child must have been, at the time of its birth, a citizen of the United States. We cannot suppose that, with the provisions of section 1993 before it, congress intended in section 2172 to alter the rule prescribed in the former section, and to make the child of one who had renounced his citizenship in the United States and assumed allegiance to another power, born after such renunciation and assumption, a citizen of the United States; in other words, to make a child born abroad, of an alien, a citizen of this country.

The writ must be denied; and it is so ordered.

We concur: MYRICK, J.; SHARPSTEIN, J.

MILLIKEN *v.* HOUGHTON. (No. 8,204.)

Filed October 21, 1884.

JUDGMENT REVERSED.

On authority of *Diggins v. Reay*, 54 Cal. 525; *Harney v. Appelgate*, 57 Cal. 205; and *Thompson v. Johnson*, 60 Cal. 295, judgment as to Hibernia Savings & Loan Society reversed.

Department 1. Appeal from the superior court of the city and county of San Francisco.

This was an action on a street assessment. The appellant and Eastland and Lauders, parties defendant, owned the land assessed as tenants in common. The action as to Eastland and Lauders was dismissed, and a decree rendered adjudging a lien and ordering a sale. Defendant appealed.

Tobin & Tobin, for appellant.

J. M. Wood, for respondent.

By THE COURT. On the authority of *Diggins v. Reay*, 54 Cal. 525; *Harney v. Appelgate*, 57 Cal. 205; and *Thompson v. Johnson*, 60 Cal. 295, judgment as to defendant the Hibernia Savings & Loan Society reversed, and cause remanded for further proceedings.

66 Cal. 31

VOGT v. COPE. (No. 7,865.)

Filed October 21, 1884.

EVIDENCE—MARKET VALUE—NEWSPAPER REPORTS.

The published "reports of sales" of a stock exchange are not competent evidence of market value without proof as to the sources from which the information therein was obtained, or whether the quotations of prices were derived from actual sales or otherwise.

Department 1. Appeal from the superior court of the city and county of San Francisco.

E. Bartlett, for appellant.

Jarboe & Harrison, for respondent.

Ross, J. Action for the conversion of certain mining stocks. The plaintiff recovered judgment, but only for nominal damages, inasmuch as there was no proof of the value of the property converted. The record shows that the plaintiff "offered to read in evidence from the published reports of sales of mining stocks in the San Francisco Stock Exchange Board for the month of September, 1878, to show the highest market value of said stock since the conversion of the same, and which it was agreed might be read with the same effect as the original records of said stock exchange, subject to such objections as might be otherwise made. The plaintiff then offered to prove by these reports that the stocks converted by the defendants sold at certain prices between the date of conversion and the bringing of the suit. The defendants objected to the introduction of the proffered evidence on the ground, among others, that it was irrelevant, immaterial, and incompetent. The court sustained the objection, and the plaintiff submitted his case without making any proof of the value of the stocks converted.

As the case was submitted in the court below, that court could only award the plaintiff nominal damages; and if this ruling with respect to the plaintiff's offer was correct, we must affirm the judgment. There was nothing to show, or tending to show, how or in what manner the "reports of sales" were made up; where the information they contained was obtained; or whether the quotations of prices made were derived from actual sales, or otherwise. In the absence of some such proof, the "reports of sales" offered by the plaintiff were incompetent, and the court below was right in its ruling. *Whelan v. Lynch*, 60 N. Y. 474. It would have been a very simple

matter to have proved the value of the stocks in question; but, simple as it was, the proof was not given. We must affirm the judgment and order. So ordered.

We concur: McKINSTRY, J.; MCKEE, J.

66 Cal. 38

BANK OF CALIFORNIA v. DUNN, Comptroller. (No. 9,476.)

Filed October 23, 1884.

COUPON BONDS—ACT OF APRIL 4, 1864.

Coupon bonds issued under the act of April 4, 1864, are valid, and the state must pay the interest due on the coupons to the holders.

Department 2. Appeal from the superior court of Sacramento county.

W. W. Foote and McCune & George, for appellant.

S. C. Denson and S. W. Sanderson, for respondent.

BY THE COURT. The court below rendered judgment that the defendant draw his warrant for the amount of an interest coupon on a bond issued under the act of April 4, 1864. St. 1863-64, p. 344. We are of opinion that none of the matters presented on behalf of defendant are sufficient to justify the withholding of the warrant. The act above referred to pledged the faith of the state to the payment to the holder of the bonds mentioned therein of such interest as is involved in this section. Judgment affirmed.

66 Cal. 44

SUTTER STREET R. Co. v. BAUM. (No. 8,595.)

Filed October 28, 1884.

1. CORPORATIONS—LOANS BY DIRECTORS.

Directors and other officers may, when they honestly deem it for the interest of the corporation to borrow, advance it money on terms as favorable as any on which they could have procured the money for it from other sources; and they may take from the corporation security for their loan, but may not use their position to obtain for themselves an undue advantage.

2. EQUITY—RESCISSION OF CONTRACTS—OFFER TO DO EQUITY.

Where a plaintiff comes into a court of equity asking for the rescission, in whole or in part, of a contract, or to be relieved of a portion of a contract, and the taking of an account is necessary for the ascertainment of the sum to be repaid, or the sum is to be liquidated by an adjudication based on evidence of facts independent of the terms of the contract itself, an offer to refund such sum as shall be decreed is a sufficient offer to do equity. In such case the plaintiff cannot determine in advance of the suit the amount by him to be repaid, and is not required to make an actual tender of such amount before commencing his action.

3. FINDINGS—EVIDENCE.

Findings held sustained by the evidence.

Department 1. Appeal from the superior court of the city and county of San Francisco.

Lloyd, Newlands & Wood and *W. H. Sharp*, for appellant.

Wilson & Wilson and *J. P. Hoge*, for respondent.

McKINSTRY, J. 1. The court below found:

"Prior to the twenty-first day of November, 1878, and at all times herein mentioned, the defendant Shrier was and is the partner of the defendant Baum: that although the said notes and mortgage were made to the said Shrier by name, yet he never had any real or beneficial interest therein, and never advanced any part of the said \$125,000, (the full amount received by plaintiff;) that the defendant Baum was the person who advanced all of said money, and that he was the real and substantial owner of all of said notes and mortgage, and that he negotiated the said loan and arranged the terms thereof with his co-directors of said corporation; that the said Shrier merely lent his name to the transaction; * * * that about the eighteenth of August, 1879, the said notes and mortgage were formally assigned, transferred, and delivered to the said Baum; and that, ever since said last-mentioned day, said Baum has been the (legal) owner and holder thereof, and still is such owner and holder."

There was sufficient evidence to uphold the finding.

2. It is not necessary to say whether the notes and mortgage were or were not void. For the purposes of this decision it may be conceded, as is claimed by appellant, that the doctrine laid down by Mr. Taylor (in his *Treatise on the Law of Private Corporations*, § 634) is just, and sustained by authority. That writer says:

"The following rules regarding loans to a corporation from its officers seem deducible from the preceding and other cases. Directors and other officers may, when they honestly deem it for the interest of the corporation to borrow, advance it money on terms as favorable as any on which they could have procured the money for it from other sources; and they may take from the corporation security for their loan," etc.

3. The court below found, "from the tenth day of July, 1879, (the date of the resolution which purported to authorize the execution of the notes and mortgage,) ten per cent. was an excessive and unjust rate of interest; and from and after said day, according to current market rates, nine per cent. per annum upon said \$125,000 was a fair, just, and reasonable rate of interest, the mortgagee paying the tax upon said debt and mortgage."

The most that can be conceded to the defendant Baum is that he believed it to be for the interest of the corporation to borrow \$125,000, the money which it actually received. The finding, of course, is to be applied to the transaction before the court, and is to the effect that 9 per cent., the mortgagee paying the taxes, was a just, fair, and reasonable rate to be paid for the use of the \$125,000; reference being had to the security in fact given, and to the usual rates paid in similar cases. Accepting the doctrine laid down by Taylor, and it being conceded that defendant Baum was authorized to advance the money at 9 per cent., secured by mortgage on the property of plaintiff, he to pay all taxes on the mortgage, he was not justified in

contracting with his co-directors that, in consideration of \$125,000 advanced by him, he should receive notes in the aggregate amounting to \$137,500, bearing interest at the rate of *ten* per cent. per annum, even though by oral contemporaneous agreement it was provided that of the excess beyond \$125,000 and interest the plaintiff should be required to pay only the sum which the defendant might pay for taxes upon the property, with interest thereon. The court was therefore justified in holding that the notes and mortgage should be satisfied upon payment by plaintiff of \$125,000, with interest thereon from July 10, 1879, at the rate of 9 per cent. per annum, less interest paid since that date.

4. The court also found "that in negotiating, arranging, and bringing about the transaction the defendant Baum used his position as director to obtain for himself an undue advantage," etc. The evidence sustained the finding, and it follows that from the amount to be paid by plaintiff there should also be deducted \$158, expenses of making and acknowledging the mortgage.

5. In its complaint plaintiff offers to comply with all terms imposed by the court as conditions to a decree in its behalf, and offers to refund to the defendants any and all sums of money received from them, or either of them, together with such amount of interest thereon as may be just and equitable. Where a plaintiff comes into a court of equity asking for the rescission in whole or in part of a contract, or to be relieved of a portion of a contract, and the taking of an account is necessary for the ascertainment of the sum to be repaid, or the sum is to be liquidated by an adjudication based on evidence of facts independent of the terms of the contract itself, an offer to refund such sum as shall be decreed is a sufficient offer to do equity. In such case the plaintiff cannot determine in advance of the suit the amount by him to be repaid, and is not required to make an actual tender of such amount before commencing his action. Judgment and orders affirmed.

We concur: McKEE, J.; ROSS, J.

69 Cal. 255

LUX v. HAGGIN. (No. 8,587.)

Filed October 27, 1884.

1. WATER—RIGHTS IN—HOW GAINED AND LOST—USER.

A right to water is a corporeal right or hereditament which passes by grant of the land over which it runs. It may be conveyed absolutely, or lost or acquired, either wholly or in part, by an adverse user, sufficiently long, exclusive, and notorious to furnish adequate grounds for presumption of a grant.

2. RIPARIAN PROPRIETOR—REASONABLE USE OF WATER.

Every riparian proprietor has an equal right to the unimpeded flow in its natural course and to the reasonable use of waters flowing in a natural stream over his land. What may be a reasonable use in any given case depends on the facts and circumstances of that case.

3. APPROPRIATION OF WATER—STATE GRANT.

The state has power to authorize the appropriation of water running through its own lands, and such an appropriation would vest in the appropriator a right in the water thus appropriated superior to that of a subsequent purchaser from the state of the lands through which such water had previously run. But neither the state nor federal government has power to authorize the appropriation of water running through private lands for a private purpose, nor for a public purpose until just compensation is first made therefor.

4. SAME—EVIDENCE—MATERIAL ISSUES—FINDINGS.

Where the question at issue was whether lands involved in the trial were public lands at the time the right to appropriate water running over such land was acquired, the exclusion of evidence of that fact was a material error. Evidence and findings should be confined to material issues in the case, and the court should find ultimate and not probative facts.

In bank. Appeal from the superior court of the city and county of San Francisco.

Stetson & Houghton, for appellants.

Louis P. Haggin, for respondents.

SHARPSTEIN, J. The question whether in this state one can rightfully divert and appropriate to a useful purpose any considerable part of the water flowing in a natural stream over the lands of others, who are making no use of it, and deriving no benefit from it, beyond such as it naturally confers by running through their lands, has been elaborately argued by counsel. The contention of the respondent is that "the doctrine that the owner of land upon the margin of a flowing stream has the right, incident to such ownership, that such stream shall continue to flow unaltered in quality and undiminished in quantity, is a doctrine that was unknown to the common law of England, but, on the contrary, the common law was that first in time was first in right as to the uses of the water of a flowing stream, and no action could be maintained except for a disturbance of actual use under an appropriation previously made;" and that the law of this state, in this respect, is the same as the common law of England was. But if the common law of England were otherwise, "the so-called doctrine of riparian rights, whereby a proprietor of land bordering upon a running stream is presumed to have a right to the full, free, and uninterrupted

waters of such stream, is not, and never has been, the law of this state; at least, so far as appertains to state or government lands, as contradistinguished from those held by Mexican grant."

While it may be difficult and perhaps impossible to define with precision the character and extent of the right which the grantee of a parcel of land acquires in a natural stream of water running over it, all the text writers and all the cases, so far as we are advised, agree that it constitutes a corporeal right or hereditament that passes by grant of the land over which it runs. "For land," says Sir EDWARD COKE, "comprehendeth in its legal signification any ground, soil, or earth whatsoever; as arable meadows, pastures, woods, moors, waters, marshes, furzes, and heath." 1 Inst. 4; 2 Bl. Comm. 18; Woolr. Waters, 146; Ang. Water-courses, 8.

"The right to flowing water is now well settled to be a right incident to property in the land." SHAW, C. J., in *Elliot v. Fitchburg R. Co.* 10 Cush. 193. "But this right or corporeal hereditament, which is embraced within or appertains to the ownership of the land over and through which a water-course runs, is subject to the same incidents as all other interests in real property. It may be conveyed absolutely by grant; so, too, it may be lost or acquired, either wholly or in part, by an adverse user, sufficiently long, exclusive, and notorious to furnish adequate grounds for the presumption of a grant." *Brace v. Yale*, 10 Allen, 441. So that, whatever limitations there may be upon the right, it is well settled that the right itself is incident to property in land; it constitutes a real or corporeal hereditament. It is often said that the owner of land over which a natural stream of water runs has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat* is the language of the law. 3 Kent, Comm. 561. "For water is a movable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient usufructuary property therein." 2 Bl. Comm. 18. From the context it is quite clear that the learned commentator meant no more than that a natural stream of water must of necessity continue common as between all who own lands through which it runs. Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run, (*currere solebat*,) without diminution or alteration." 3 Kent, Comm. 439. And the same doctrine was laid down in nearly the same words by Sir JOHN LEACH in *Wright v. Howard*, 1 Sim. & S. 190, in which the vice-chancellor said:

"Every proprietor has an equal right to use the waters which flow in the stream, and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above."

With the exception of the *dicta* in a few cases cited by counsel for respondent, we have been unable to discover anything in the text-books or reports which conflicts with this exposition of the common-law doctrine on the subject. And in *Mason v. Hill*, 5 Barn & A. 1, DENMAN, C. J., said:

"None of these *dicta*, when properly understood with reference to the cases in which they were cited, and the original authorities in the Roman law from which the position that water is *publici juris* is deduced, ought to be considered as authorities that the first occupier or first person who chooses to appropriate a natural stream to a useful purpose has a title against the owner of the land below, and may deprive him of the benefit of the natural flow of the water."

Has the common-law rule in this respect been abrogated or modified in this state? We know of no case in this state prior to *Ferreira v. Knipe*, 28 Cal. 341, which involved the question of the right of an owner of land to have a natural stream of water which flowed over it to continue to do so without material obstruction or diminution from artificial causes. In that case the court, "while admitting that a riparian owner to whom the water first comes in its flow has the right to use it for domestic purposes and for watering his cattle," said "that he has not the right to so obstruct the stream as to prevent the running of water, substantially, as in a state of nature it was accustomed to run." This has never been overruled or doubted, nor is it in conflict with any of the earlier reported cases.

But it is insisted by respondent's counsel that both the United States and this state have adopted a policy in respect of water flowing over their lands which is inconsistent with the doctrine of riparian rights as we construe it. As a result of that policy it is claimed that a grant of land by either of those governments must be read as if it contained a condition that any one should thereafter be at liberty to appropriate so much of the water of any natural stream running over such land as the grantee had not previously appropriated to some useful purpose other than that which it subserved by flowing naturally over such land. That would constitute a reservation of an interest in the land granted, not for the benefit of the grantor, but for that of any other person who might choose to avail himself of it. If a grant does not contain any such express reservation or condition, we ought not to interpolate one unless it is clearly implied, because the general rule is that the owner of property cannot be divested of any interest in it by the simple prior appropriation of that interest by some one else. Both the state and the United States governments have granted to private persons and corporations large tracts of land which have remained unoccupied and in their virgin state for many years afterwards. It probably never occurred to any one that the owners, by neglecting to appropriate the grasses and trees naturally growing on such lands to some useful purpose, left them open and subject to a rightful appropriation

by any one else. And yet we have the same authority for holding that a simple grant of land conveys a right to have the water flowing over it continue so to flow, as we have for holding that it conveys a right to the trees and grasses growing on it, or to the soil itself. The principle that he who first appropriates property to a useful purpose is best entitled to it, applies only to cases in which none of the parties has a grant, actual or presumptive.

In an early case, which involved the question "whether the owner of a canal in the mineral region of this state, constructed for the purpose of supplying water to miners, has the right to divert the water of a stream from its natural channel, as against the claims of those who, subsequent to the diversion, take up lands along the banks of the stream for the purpose of mining," the land through which the stream ran, and through which the channel passed, being a part of the public domain to which there was no claim of private proprietorship, the court held that the common-law doctrine, which "prescribes that a water-course must be allowed to flow in its natural channel," could not be invoked in such a case, because, as the court said, that doctrine would, upon an examination of the authorities which support it, "be found to rest upon the fact of the individual rights of landed proprietors upon the stream; the principle being, both at the civil and common law, that the owner of lands on the bank of a water-course owns to the middle of the stream, and has the right, in virtue of his proprietorship, to the use of the water in its pure and natural condition." *Irwin v. Phillips*, 5 Cal. 140.

In *Crandall v. Woods*, 8 Cal. 136, where both parties had possessory rights in separate parcels of land, the title of which was in the United States, it was held that each had a right to have a stream of water, which naturally flowed over both parcels, continue to flow over the parcel in his possession substantially as it did when his possessory right first attached to it. As between themselves, their respective rights in the stream were held to be those of riparian owners. In *Hill v. Smith*, 27 Cal. 476, it is explicitly denied that the rules of the common law touching water-rights have been materially modified in this state, although in that case it is said that these rules do not apply to sections of the state in which water is exclusively used for mining purposes. But this was said in a case in which neither of the parties owned any land over which a natural stream of water flowed. The respective rights of prior and subsequent appropriators were alone involved. It is claimed that the same reason exists for not applying the common-law doctrine of riparian rights to the agricultural as is given for not applying to the mining regions of the state, because water is as essential to the prosecution of the one industry as of the other, in this state. But in *Hill v. Smith* the court says: "When the law declares that a riparian proprietor is entitled to have the water of a stream flow in its natural channel—*ubi currere solebat*—without diminution or alteration, it does so because its flow

imparts fertility to his land, and because water in its pure state is indispensable for domestic uses. But this rule is not applicable to miners and ditch-owners, simply because the conditions upon which it is founded do not exist in their case." The conditions upon which it is said the rule is founded do exist in agricultural districts; and it is the rule applicable to those districts which concerns us in this case. And, after carefully examining all the cases bearing on this question, we are unable to find one in which it is held or even suggested that outside of the mining districts the common-law doctrine of riparian rights does not apply with the same force and effect in this state as elsewhere.

And the reason why it did not apply to the mining districts is given in the opinion of the court by FIELD, J., in *Atchison v. Peterson*, 20 Wall. 507, where he says:

"The government being the *sole* proprietor of all the *public* lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of *those* streams. The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and, to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale, and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific states and territories, by their customs, usages, and regulations, everywhere recognized the inherent justice of this principle, and the principle itself was at an early period recognized by legislation, and enforced by the courts in those states and territories."

Which is, in effect, saying that the government, being the owner of all the land through which a stream of water runs, had a right to permit the diversion and use of it by any one who chose to divert and use it for mining, agricultural, or other purposes. There is not only no occasion for the application of the doctrine of riparian proprietorship to such a case, but it is one to which the doctrine could not be applied.

The provisions of the Civil Code in respect to the appropriation of water must be limited to that which flows over lands owned by this state or by the United States. It cannot affect the rights of riparian proprietors, (1) because it is expressly declared that it shall not; and (2) because an owner of land cannot be divested of any interest which he has acquired in it except for a public use, and not then until just compensation has been made for it. Grants from the state and from the United States have always been construed like other grants, and a simple grant of land by either conveys the same interest as the grant of a private owner would. We think a grant of swamp or overflowed land conveys all the corporeal rights or hereditaments that a grant of any other land conveys. Property rights are essentially the same and quite as secure here as elsewhere. The right to acquire and possess property is as fully protected by the constitution of this

state as it is by that of any other state. No one can be deprived of it except by due process of law. Private property cannot be taken or damaged except for one purpose, and then only on condition that just compensation is first made. But whoever purchases land from the United States or this state after the whole or some part of the water of a natural water-course running through such land has been appropriated by some one else under the act of congress of July 26, 1866, or under the provisions of title 8 of the Civil Code of this state, takes subject to the rights acquired by such prior appropriator.

We do not doubt the power of the state to authorize the appropriation of water running through its own lands, and we think that such an appropriation would vest in the appropriator a right in the water thus appropriated superior to that of a subsequent purchaser from the state of the lands through which such water had previously run. It therefore follows, from our point of view, that the material issue in this case is whether the defendant has diverted from the land of the plaintiffs, since the title of the state thereto vested in them or their grantors, the water of a stream which otherwise would naturally have flowed over such land.

The plaintiffs allege that they are the owners of land "situated along and bordering on Buena Vista slough," which is, and, as they are informed and believe, "from time immemorial has been, a part of the natural stream or water-course known as the Kern river, and through it the waters of said Kern river flow and always have flowed on their way to Tulare lake." This is denied by the defendant. The issue is a vital one, and the finding on it is in favor of the defendant. If the finding is justified by the evidence, the order denying the plaintiff's motion for a new trial cannot be disturbed unless some material error was committed during the trial. To maintain this issue on their part, the plaintiffs introduced evidence which tended to prove the substance of said allegation: *First*, they introduced patents for the lands described in their complaint from the state to them, and to their grantors; *second*, they introduced evidence tending to prove that said lands bordered on Buena Vista slough, and that said slough formed a part of a natural water-course known as the Kern river, and that the waters of said river flowed through said slough to Tulare lake.

The defendant not only denied the material allegations of the complaint, but pleaded a prior appropriation, under the laws of this state, of a certain specified part of the water of said Kern river, and introduced evidence which tended to prove that said appropriation antedated any of the patents which the plaintiffs had introduced in evidence. After the defendant had rested, the plaintiffs sought to introduce certificates of the purchase of said lands by them and their grantors from the state prior to the date of defendant's said appropriation. To the introduction of said evidence an objection was made by the defendant, and sustained by the court. The grounds of the

objection were that the evidence was "irrelevant, immaterial, incompetent, and not proper testimony in rebuttal." The materiality of it is apparent. If the appropriation was made while the state was the owner of said lands, the defendant's rights as to the water appropriated, according to the provisions of the Civil Code, would be superior to those of subsequent purchasers of said lands. Civil Code, §§ 1410, 1422. But a diversion of water, flowing in a natural stream over the plaintiffs' lands, could not be justified on the ground that it was diverted by virtue of an appropriation made subsequent to the plaintiffs' purchase of said lands from the state. Unless previously appropriated, water so flowing over said lands at the date of the plaintiffs' purchase could not afterwards be diverted without affecting their rights as riparian proprietors. And the rights of riparian proprietors are not affected by the provisions of the Code. *Id.* § 1422. The right to have the water which flowed over their lands, at the date of their purchase, continue to flow *currere solebat*, was a corporeal hereditament, of which the plaintiffs could not be deprived except in the mode and for the purpose prescribed by the constitution. The evidence was clearly admissible, and it was error to exclude it. *Homestead Ass'n v. Willard*, 48 Cal. 614.

The defendant also introduced evidence tending to prove that, by reason of natural obstructions, at certain points in Buena Vista slough above plaintiffs' lands, the water of said slough did not flow over any of said lands. After the defendant had rested, the plaintiffs called witnesses to prove that there were no such obstructions at those points. To the introduction of such evidence an objection was made and sustained. This ruling was erroneous. The court found that neither of the parties was a riparian proprietor. If that be the fact, there is no occasion for considering what their respective rights would be were the fact otherwise. If the plaintiffs were not riparian proprietors, they have no cause of action. If they are, and the defendant is not, it has no right to interfere in any way with the natural flow of a stream of water over the plaintiffs' land. A riparian proprietor has a right to the reasonable use of water flowing in a natural stream over his land. What may be a reasonable use in any given case depends upon the facts and circumstances of that case. But it is only as between riparian proprietors that the question can ever arise. According to the findings of the court the question of riparian rights is in no way involved in the case.

The plaintiffs must prove, by a preponderance of evidence, that there is a natural water-course running through their land, from which the defendant has diverted or obstructed the natural flow of the water, before they will be entitled to any relief; and even then they will not be entitled to any, if the defendant proves, by a preponderance of evidence, that the water so diverted was duly appropriated, in accordance with the law of the state, while said land was owned by the state or the United States. *Osgood v. El Dorado Water Co.*

56 Cal. 571; *Broder v. Water Co.* 101 U. S. 277. The only difficulty that need be experienced is in arriving at the facts. The law is plain enough. *Ferrea v. Knipe*, 28 Cal. 341; *Wixon v. Bear River Co.* 24 Cal. 367; *Hill v. Smith*, 27 Cal. 476; *Pope v. Kinman*, 54 Cal. 3; *Creighton v. Evans*, 53 Cal. 55; *Leigh Co. v. Independent Ditch Co.* 8 Cal. 323; *Crandall v. Woods*, Id. 136; *Ellis v. Tone*, 58 Cal. 289; *Lytle Creek Water Co. v. Perdew*, 1 West C. Rep. 866; S. C. 2 Pac. REP. 732; *Learned v. Tangeman*, 3 West C. Rep. 153; S. C. 4 Pac. REP. 191; *Osgood v. El Dorado Water Co.* 56 Cal. 571; *Broder v. Natoma Water Co.* 101 U. S. 277.

Unless the plaintiffs were estopped—and the court does not find that they were—by reason of their acts and conduct while the defendant was constructing its works for the diversion of the water of Kern river, from complaining of such diversion, the findings that the plaintiffs knew of the intention of the defendant to divert said water before any was diverted, and of the construction of works by defendant for that purpose, but made no objection to the operations of defendant before the commencement of this action, are irrelevant. The facts found do not, in our opinion, constitute an estoppel, and if not, the plaintiffs had the full statutory period within which to commence their action. The evidence, as well as the findings, should be confined to the material issues in the case; and the court should find the ultimate and not the probative facts. Order reversed.

We concur: MCKINSTRY, J.; THORNTON, J.

MCKEE, J., *concurring*. In the examination of every case before a court of justice the first important inquiry is, what are the inherent facts of the case? And the second, what is the law applicable to the facts? Law, announced without reference to the facts, is the source of much error. The plaintiffs in the action in hand claimed to be, and the court found they were, at the commencement of the action, owners in fee, seized and in possession of an extensive tract of country described in their complaint, the title to which they acquired by letters patent from the state of California, issued to them in the years 1876 and 1877, and under a statute of the state entitled "An act to provide for determining the rights of parties in certain swamp and overflowed lands in Fresno and Kern counties," approved March 20, 1878. The lands, it is alleged, are situate along and bordering on a natural water-course known as "Buena Vista Slough," and along and bordering on Buena Vista lake and Kern lake, and a natural channel which connects the two lakes. Buena Vista slough is claimed to be the lower portion of a natural water-course known as Kern river,—a river which, rising in the Sierra Nevada, debouches from the mountains into the plains about 10 miles from the town of Bakersfield, in Kern county, whence it flows naturally to and through the Buena Vista slough northward into Tulare lake, and part of its waters

through the natural channel connecting Buena Vista lake and Kern lake into the said lakes.

The facts as found by the court are: That the plaintiffs' lands are situated in and form part of the body of the swamp and overflowed lands known as Buena Vista swamps; that a portion of them border on that part of Buena Vista slough south of where the present lower portion of Kern river, known as New river, empties into the slough, and the water of the river, in its natural course, flows into and through the slough, and also to and into Kern and Buena Vista lakes. To the extent that the plaintiffs' lands are situate upon these natural water-courses the plaintiffs are riparian proprietors. As such they claim the right to the natural flow of the water of Kern river through the slough and the natural channel which connects the lakes, and to the use of the same for domestic purposes and irrigation. Unquestionably, the plaintiffs, as owners of lands upon which or between which there is a natural water-course, are entitled to the natural flow of the water in the channel of the water-course, and to its use for domestic purposes, for watering live-stock, and for irrigation. Such a right is a natural right existing in the soil over which the water flows; and if it did, in fact, exist in the soil at the time of the acquisition of title to the soil, it was as much a part of the estate acquired by the title as was the soil itself to which the title attached; and the owner could no more be divested of it against his consent, by the subsequent act of another, than he could be of the soil itself. Water flowing in a natural water-course upon or between a man's lands is, therefore, property in the highest sense of the term. The absolute owner of real property is entitled in law to every right appertaining to it in the condition in which it was at the time of the acquisition of his title to it, and to be protected by law in its enjoyment. In that regard the source of his title makes no difference. A grantee or patentee of land from the state of California or from the United States is certainly entitled to equal rights in his lands, and to the protection of the law in the enjoyment of those rights as a grantee from the Spanish or Mexican governments.

But the great contention is that the right to the natural flow of the water of Kern river through the natural channels already mentioned, down to and through the lands of the plaintiff, did not exist when the plaintiffs acquired their titles to these lands, and, as it did not exist, it did not pass to the plaintiffs from the state, nor under the statute referred to; because the defendant had, under the authority and sanction of law, while the lands belonged to the state of California, acquired the right to divert the water of Kern river from its natural channel at a point above the lands of the plaintiffs, and to appropriate it for beneficial uses. As a fact, the court finds that on the fourth of May, 1875, the grantors of the defendant did acquire the right to appropriate 74,000 inches of the water of Kern river, meas-

ured under a four-inch pressure, and that under that right they and their successors in interest actually diverted and have continued to divert, at a point in the river above the lands of the plaintiffs, that amount of water from the natural channel of the river by means of a main ditch or canal and its distributing ditches, for the purpose of irrigating lands along the route of the canal and its ditches, and supplying the owners and occupants of such lands with water. Assuming the acquisition of such a right on the fourth of May, 1875, (while the lands which might be affected by it belonged to the state,) as a valid existing right, which has passed to, and vested in, and has been exercised and enjoyed by, the defendant, it is a right superior to that asserted by the plaintiffs; for, as I understand it, it is settled law, so far as this state is concerned, that property in the water of a stream upon the *public lands* may be acquired by mere appropriation for mining or other beneficial purposes; and that the first appropriator is, to the extent of his appropriation, the owner as against all the world, except the government. Such will be found to be the established doctrine of this court and of the supreme court of the United States in a great number of cases, commencing with *Hill v. Newman*, 5 Cal. 445, and ending with *Broder v. Natoma Water Co.* 101 U. S. 274. In the last case the Natoma Water Company, in the year 1853, constructed upon *public lands* of the United States a canal through which, under a right of appropriation, it brought water from a stream flowing upon public lands for mining and other purposes. Several years afterwards the plaintiff acquired title to the lands upon which the canal was constructed,—to one portion of them by a pre-emption settlement, made under an act of congress passed in 1866, and to the other portion, by deed from a railroad company under a grant to the company. Being an owner of the land, he brought suit against the water company to abate the canal as a nuisance. But the supreme court held that the right of the prior appropriator of the water of the stream, under which the company constructed its canal upon the public lands, was a pre-existing right which the government had recognized and confirmed; and the subsequent grantee of the lands from the government took them subject to the pre-existing right of the company.

But an appropriation of the water of a stream flowing upon public lands, and upon lands held in private ownership, does not affect or destroy riparian rights existing in the stream at the time of the appropriation. Both rights—rights of appropriation and riparian rights—may be acquired by original and derivative acquisition; they may exist together and be held in common as property, and each is entitled to the protection of the law. Riparian rights depend upon the ownership of land which is contiguous to and touches upon a natural water-course. Rights of appropriation arise out of some law or agreement or grant, or the presumption of a grant, arising from

the lapse of the period of prescription, or by the operation of the statute of limitations. The difference between the two rights is clearly expressed by the English supreme court of judicature as follows:

"The right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial water-course constructed on his neighbor's land, do not rest on the same principle. In the former case each successive riparian proprietor is *prima facie* entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter, any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or some other legal origin." 31 Eng. Rep. 771.

In the case before us the right asserted by the defendant was not founded upon prescription, nor upon adverse possession, nor the time required by the statute of limitations, nor upon a grant, nor the presumption of a grant. The source of the right is found in the fact that in the year 1875 the lands on which the right originated were public lands, upon which the grantors of the defendant were authorized by law to enter and acquire the right. According to the claim of the defendant, the right, therefore, originated in the policy of the government as to its public lands. But if the lands did not, at the time of the acquisition of the right, belong to the government, but had passed into the ownership of riparian proprietors, then such lands were not in a condition in which any rights appertaining to them, or incidental to them, could be legally appropriated by any one without the consent of the true owners. The water of a stream running upon a man's lands cannot be appropriated, without his consent, for a private use, nor can it be taken from him for a public use without compensation according to the law of the land. Whether the lands involved in the trial of the case were public lands at the time the right to appropriate the water of Kern river was acquired by the grantors of the defendant was, therefore, *the* question at issue in the case. The evidence before the court upon that question preponderated in favor of the defendant, because it proved satisfactorily that the right to the water had vested in its grantors by prior appropriation, before the patents were issued by the state to the plaintiffs for their lands. The rights of the plaintiffs in the lands acquired by them were therefore subordinate to the pre-existing right of the defendant to the water. But the plaintiffs offered to prove that the lands belonged to them, as purchasers from the state, under certificates of purchase which they held as evidence of ownership at the time the grantors of the defendant originated their right. But the court excluded the evidence, and that, I think, was a material error, for which the order should be reversed.

Ross, J., *dissenting*. As I am unable to concur in the judgment of the court, or in the reasons given in support of it, I think it proper,
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in view of the great importance of the main question involved, to state the grounds of my dissent. In effect, the conclusion reached by the majority is that the grantee of any legal subdivision of the public lands of the United States or of the state, through or along which a stream of water flows, is lawfully entitled—at least, as against any one not a riparian proprietor or *previous* appropriator—to have the water continue to flow in its natural channel, undiminished in quantity and unaffected in quality. In other words, that, as against such grantee, there can be no such subsequent appropriation of any of the water of such stream as will reduce the natural flow in quantity, through however much public land the stream may flow before reaching the subdivision granted. This, of course, is conceding that the court below should have allowed the plaintiffs to have put in evidence their certificates of purchase, some of which antedated the appropriation under which the defendant claims, and concedes, further, that the certificates of purchase conferred upon the plaintiffs the same rights, with respect to the water in question, as would have been conferred by patents, and that the lands of the plaintiffs border upon the stream from which the diversion complained of is made. I assume all this because, from the view I take of the main question, those matters become immaterial. The validity of appropriations made *prior* to the grant from the state or the United States I understand to be conceded in the opinion of the majority.

Although numerous contests with respect to water have arisen and been adjudicated by the supreme court of this state, as well as by the supreme court of the United States, neither court has heretofore been called upon to decide the precise question now at issue. But the *principle* which, in my opinion, should control its determination has been uniformly held by both tribunals. The doctrine that the water of a stream must continue to flow in its natural course undiminished in quantity has been so far modified in states with the climatic conditions of Massachusetts and Illinois, as to permit the diversion of water for the purposes of irrigation, where the quantity of the stream is necessarily diminished by at least the quantity absorbed in the irrigation of the land upon which it is put. Especially should this be so in California, where, in a great part of the state, water is its very life-blood. Every practical man must know that, with the dry atmosphere and porous soils of those sections requiring irrigation, but little, if any, of the water diverted and used in irrigation is or can be returned to the stream from which it is taken. To establish, therefore, as the law of this state that the water of a water-course must flow on in its natural channel undiminished in quantity, would, in effect, be to convert the fertile fields, gardens, orchards, and vineyards in many and great sections of the state into waste and desert places. Such a rule is inapplicable to the condition of things existing here. The common law is supposed and has been said to be the perfection of human reason, but it would be the very reverse of this

to hold that the waters of the streams of California must continue to flow in their natural channels until they sink into the sand or waste themselves in the sea, while orchards, vineyards, and growing crops, of immense if not incalculable value, perish for thirst.

In the case of *People v. Canal Appraisers*, 33 N. Y. 482, the court of appeals of New York quoted with approval this language of Judge BRONSON: "I think no doctrine better settled than that such portions of the law of England as are not adapted to our condition form no part of the law of this state. This exception includes not only such laws as are inconsistent with the spirit of our institutions, but such as were framed with special reference to the physical condition of a country differing widely from our own. It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a law, when that reason utterly fails,—*cessante ratione legis, cessat et ipsa lex.*" And in *McClintock v. Bryden*, 5 Cal. 100, this court said: "The wants and interests of a country have always had their due weight upon courts in applying principles of law which should shape its conditions; and rules must be relaxed, the enforcement of which would be entirely unsuited to the interests of the people they are to govern." In the case of *Atchison v. Peterson*, 20 Wall. 511, the supreme court of the United States held that, as respects the use of water for mining purposes throughout the Pacific states and territories, "the doctrines of the common law declaratory of the rights of riparian owners were, at an early day after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent, to the necessities of miners, and inadequate to their protection. By the common law," said the court, "the riparian owner on a stream not navigable takes the land to the center of the stream, and such owner has the right to the use of the water flowing over the land as an incident to his estate. And as all such owners on the same stream have an equality of right to the use of the water, as it naturally flows, in quality and without diminution in quantity, except so far as such diminution may be created by a reasonable use of the water for certain domestic, agricultural, or manufacturing purposes, there could not be, according to that law, any such diversion or use of the water by one owner as would work material detriment to any other owner below him. Nor could the water by one owner be so retarded in its flow as to be thrown back to the injury of another owner above him." In the subsequent case of *Basey v. Gallagher*, 20 Wall. 682, the court held that the views expressed and rulings made in the case of *Atchison v. Peterson* "are equally applicable to the use of water on the public lands for purposes of irrigation."

It has never been held by the supreme court of this state that the waters of the non-navigable streams of the state are not subject to diversion for the purposes of irrigation. On the contrary, the right so to divert them has been frequently upheld. The latest case upon

the subject is that of the *Anaheim Water Co. v. Semi-tropic Water Co.* 12 Pac. C. Law J. 158.

In the case at bar no question arises as to the rights of grantees of Spanish or Mexican grants, or their successors in interest, through or along whose land a stream of water flows, either as between themselves or others. The question here is between a purchaser of a part of the public land of the state, derived from the United States, and an appropriator of water upon the public lands of the United States. From the foundation of the state, waters pertaining to the public lands of both the federal and state governments have been appropriated and used for mining, agriculture, and other useful purposes. Such appropriation and use was first sanctioned by custom, next by the decisions of the courts, and finally by legislative action on the part of the United States as well as the state. It thus became a part of the law of the land, of which every citizen was entitled to avail himself, and of which every purchaser from the United States, as well as the state, was bound to take notice. In protecting, therefore, the rights of appropriators of water upon the public lands of the state and of the United States, no wrong is done to the purchasers from either government. That from the very beginning it has been the custom of the people of the state to divert from their natural channels the waters of the streams upon the public lands, and appropriate the same to the purposes of mining, agriculture, and other useful and beneficial uses, is a part of the history of the state. That such diversions and appropriations have been from the earliest times recognized and sanctioned by the supreme court of the state, is equally true. Numerous cases attest this fact. *Irwin v. Phillips*, 5 Cal. 140; *Tartar v. Spring Creek Water & M. Co.* Id. 397; and *Conger v. Weaver*, 6 Cal. 555, are among the earliest. In *Hill v. King*, 8 Cal. 338, Chief Justice MURRAY, who dissented in *Conger v. Weaver*, used this language:

"The right to appropriate the waters of the streams of this state for mining and other purposes has been too long settled to admit of any doubt or discussion at this time. Some of the older English authorities held that a right to water might be acquired by a riparian proprietor by appropriation, and this court might, with propriety, have maintained the rights of water companies on the ground that they were riparian owners; but it has based this right on the ground that the legislation of the state has given to every one, not only a privilege to work the 'gold placers,' but also to divert the streams for this and other purposes. The legislation of the state has been held to amount to a 'general license to all,' (whether properly, is not for me to say, the point having been decided by a majority of the court against my own opinion, —see *Conger v. Weaver*, October 2, 1856,) and when these ditches have been constructed they are regarded as a franchise or easement, belonging to the proprietors, and are entitled to protection as any other property."

In *Irwin v. Phillips*, *supra*, after stating that a system of rules had been permitted to grow up with respect to mining on the public lands by the voluntary action and assent of the population, whose free

and unrestrained occupation of the mineral region had been tacitly assented to by the federal government, and heartily encouraged by the expressed legislative policy of the state, the court said: "So fully recognized have become these rights, and without any specific legislation conferring or confirming them, they are alluded to and spoken of in various acts of the legislature in the same manner as if they were rights which had been vested by the most distinct expression of the will of the law-makers." The California reports abound with cases to the same effect. *McDonald v. Bear River & A. W. & M. Co.* 13 Cal. 232; *Ortman v. Dixon*, Id. 38; *McKinney v. Smith*, 21 Cal. 381; *Smith v. O'Hara*, 43 Cal. 374; *N. C. & S. C. Co. v. Kidd*, 37 Cal. 314; and *Rupley v. Welch*, 23 Cal. 455, are among them.

It is true that in none of these cases was it a question of right between a *grantee* of either the federal or state government, and an appropriator of the waters. But the cases are cited to show that from the foundation of the state government the people of the state have been accustomed to do that which, according to the rule of the common law, they could not have done, namely, to divert and appropriate the waters of the streams flowing over the public lands for the purposes of mining, agriculture, and other beneficial uses; that this custom, which is wholly at variance with the accepted principles of the common law, has been from its very beginning acquiesced in by the state government, has been, as said by this court in 1855, in the case of *Irwin v. Phillips*, "heartily encouraged by the expressed legislative policy of the state," and has all along been recognized, sanctioned, and confirmed by the highest judicial tribunal of the state. Not only this, but the federal government, first by its silent acquiescence and afterwards by express statutory enactment, assented to this departure from the principles of the common law with respect to the waters upon the public lands in California. And it did so for the same reasons and in much the same way that the state of California assented to it. Allusion has already been made to the case of *Atchison v. Peterson*, in which the supreme court of the United States said that, as respects the use of water for mining purposes in California, "the doctrines of the common law, declaratory of the rights of riparian owners, were, at an early day after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent to the necessities of miners and inadequate to their protection;" and also to the subsequent case of *Basey v. Gallagher*, in which the same learned court declared that the views expressed and the rulings made in *Atchison v. Peterson* "are equally applicable to the use of water on the public lands for purposes of irrigation." In *Broder v. Water Co.* 101 U. S. 276, which is also a California case, the supreme court of the United States said:

"It is the established doctrine of this court that rights of miners who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches, to be used in mining operations and for purposes of agricultural irrigation, in the region where such

artificial use of water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged, and was bound to protect, before the act of 1866."

—Referring to the act of congress of July 26, 1866, the ninth section of which contains this declaration :

"That wherever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and conferred."

And the court added :

"We are of opinion that the section of the act which we have quoted (the ninth) was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one."

The court, accordingly, in the *Broder Case*, without regard to the act of 1866, protected the right of defendant to divert the water there in question from its natural channel, upon the ground that the government had, by its conduct, recognized and encouraged, and was bound to protect, such diversions. It seems to me, therefore, that this court, in the late case of *Osgood v. Water & Mining Co.* 56 Cal. 571, was entirely justified in saying, as it did, that "the principle of prior appropriation of water on the public lands in California, where its artificial use for agricultural, mining, and other like purposes is absolutely essential, which has all along been recognized and sanctioned by the local customs, laws, and decisions, was thus expressly recognized and sanctioned by the supreme court of the United States, and also by the act of congress of 1866." It was this principle, and nothing else, that secured the defendant, in the case of *Broder v. Water Co.*, in the continued enjoyment of the water it had appropriated *as against a grant from the government antedating the act of 1866*; for the court in terms declares: "We do not think that the defendant is under the necessity of relying on that statute." The defendant had acquired the right to divert the water from its natural channel and appropriate it to a useful purpose, because the government, by its conduct through a long series of years, in view of the necessities of the country, which were widely different from those of the country from which the common law was taken, had recognized and encouraged such diversions and use of the waters upon the public lands. The government permitted the principle of appropriation of such waters to grow up and become a part of the law in relation to the public lands, and therefore, in construing the grant from the government, the court considered it with reference to the principle of appropriation, and protected the rights of the defendant which arose under and by virtue of that principle. The common-law doctrine of riparian rights being wholly inconsistent with and antagonistic to

that of appropriation, it necessarily follows that when the federal and state governments assented to, recognized, and confirmed, with respect to the waters upon the public lands, the doctrine of appropriation, they, in effect, declared that that of riparian rights did not apply.

The doctrine of appropriation thus established was not a temporary thing, to exist only until some one should obtain a certificate or patent for 40 acres or some other subdivision of the public land bordering on the river or other stream of water. It was, as has been seen, born of the necessities of the country and its people, was the growth of years, permanent in its character, and fixed the *status* of water-rights with respect to public lands. No valid reason exists why the government, which owned both the land and the water, could not do this. It thus became, in my judgment, as much a part of the law of the land as if it had been written in terms in the statute books, and in connection with which all grants of public land from either government should be read. In the light of the history of the state, and of the legislation and decisions with respect to the subject in question, is it possible that either government, state or national, ever contemplated that a conveyance of 40 acres of land, at the lower end of a stream that flows for miles through public lands, should put an end to subsequent appropriation of the waters of the stream upon the public lands above, and entitle the grantee of the 40 acres to the undiminished flow of the water in its natural channel from its source to its mouth? It seems to me entirely clear that nothing of the kind was ever intended or contemplated. Of course, the doctrine of appropriation, as contradistinguished to that of riparian rights, was not intended to, and, indeed, could not, affect the rights of those persons holding under grants from the Spanish or Mexican government—*First*, because the doctrine is expressly limited to the waters upon what are known as the public lands; and, *secondly*, because the rights of such grantees are protected by the treaty with Mexico and the good faith of the government. It is the rights of such riparian proprietors as *those* that are unaffected by the doctrine of appropriation, and *those* are the riparian rights that are excepted from the operation of the provisions of the Civil Code, in relation to "water-rights," by section 1422 of that Code, which reads: "The rights of riparian proprietors are not affected by the provisions of this title." That Code, as well as the other Codes of California, went into effect the first of January, 1873. The appellants contend, and the prevailing opinion holds, that, by the section of the Civil Code just quoted, the legislature of the state declared that the common-law doctrine of riparian rights should apply to all the streams of the state. It seems very clear to me that this is not so for many reasons. Leaving out of consideration the question whether it lay in the power of the state to nullify the doctrine of appropriation established by the United States with respect to the waters flowing over their lands,—established, too, in pursuance of the policy the state itself had previously adopted,

and for the advancement of the interests of the people of the state,— I find nothing in the Civil Code, or in any of the other Codes, to indicate any intention on the part of the legislature of the state to return to the doctrine of riparian rights with respect to the waters upon the public lands. On the contrary, the Code enacts in statutory form, in language as clear as language can be made, the theretofore prevailing law of appropriation. Title 8 of the Civil Code is headed "Water-rights." The first section of that title—section 1410 of the Code—declares: "The right to the use of running water flowing in a river or stream, or down a canon or ravine, may be acquired by appropriation."

Can anything be clearer? By the common law the water flowing in a river or stream, or down a canon or ravine, could *not* be acquired by appropriation, and must continue to flow in its natural channel undiminished in quantity and unaffected in quality. Could there be any clearer declaration of the fact that the common-law doctrine of riparian rights should not apply to the streams of this state, than is found in this declaration of the statute that the waters of such streams may be acquired by *appropriation*? The statute proceeds:

"Sec. 1411. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases.

"Sec. 1412. The person entitled to the use may change the place of diversion if others are not injured by such change, and may extend the ditch, flumes, pipe, or aqueduct by which the diversion is made, to places beyond that where the first use was made.

"Sec. 1413. The water appropriated may be turned into the channel of another stream and mingled with its water, and then reclaimed, but in reclaiming it the water already appropriated by another must not be diminished.

"Sec. 1414. As between appropriators, the one first in time is the first in right."

Next follow sections providing the manner in which appropriations shall be made. Section 1420 provides that "persons who have heretofore claimed the right to water, and who have not constructed works in which to divert it, and who have not diverted nor applied it to some useful purpose, must, after this title takes effect, and within twenty days thereafter, proceed as in this title provided, or their right ceases;" and the last section of the title—1422—is the one already quoted, and reads: "The rights of riparian proprietors are not affected by the provisions of this title."

The construction claimed by appellants, and, in the prevailing opinion, given of this last section, in effect wipes out all the provisions of the title, to which it is but a saving clause. This is reversing the established rule of construction, as I understand it. To my mind, nothing is clearer than that, by the provisions of the Code referred to, the legislature continued in existence the pre-existing law with respect to the appropriation of waters upon the public lands; and as both the federal and state governments, in the exercise of a pol-

icy eminently wise and just, substituted the doctrine of appropriation for the riparian doctrine, so far as the public lands and the waters pertaining thereto are concerned, the only riparian proprietors to which the saving clause can apply are such as hold under grants from the Spanish or Mexican governments. In other words, that, in adopting the provisions of the Civil Code in question, the legislature did but codify the pre-existing law upon the subject.

From the views I entertain upon the main proposition in the case, the other questions discussed by counsel and in the prevailing opinion become unimportant. In my opinion, the order appealed from should be affirmed, and I therefore dissent from the judgment given here.

MYRICK, J. I concur in the foregoing dissenting opinion.

MORRISON, C. J. I concur in the views expressed by Mr. Justice Ross, and in his dissenting opinion.

LUX v. HAGGIN. (No. 8,588.)

Filed October 27, 1884.

JUDGMENT REVERSED.

On authority of *Lux v. Haggin*, No. 8,587, *ante*, 919, judgment reversed, and cause remanded.

In bank. Appeal from the superior court of the city and county of San Francisco. The facts and points involved in this case are the same as in *Lux v. Haggin*, No. 8,587, *ante*, 919.

Stetson & Houghton, for appellants.

Louis P. Haggin, for respondents.

By THE COURT. On the authority of *Lux v. Haggin*, No. 8,587, *ante*, 919, judgment reversed and cause remanded.

ROSS, J., MYRICK, J., and MORRISON, C. J., dissenting.

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LYONS v. CUNNINGHAM. (No. 8,276.)

Filed October 28, 1884.

1. DEFAULT—PROOF OF SERVICE OF SUMMONS.

Proof of service of summons in a case by a person other than the sheriff is a condition precedent to judgment by default. If such proof is not made as required by law the court acquires no jurisdiction of the persons of defendants, and has no authority to render judgment against them, and any judgment so rendered would be void.

2. SUMMONS—AFFIDAVIT OF SERVICE—SUFFICIENCY.

An affidavit of service of summons, stating that affiant "*is* a male citizen of the United States over the age of 18 years," is insufficient, in that it does not show that affiant was over the age of 18 years *at the time* the process was served. The words "male citizen of the United States" do not necessarily indicate that he is an elector, and therefore 21 years of age or over.

Department 1. Appeal from the superior court of the city and county of San Francisco.

R. P. Wright, for appellant.

J. C. Bates, for respondent.

McKEE, J. The judgment appealed from is a default judgment which was entered against the defendants upon proof of service of summons by the following affidavit of service, subscribed and sworn to on the nineteenth of January, 1881.

"George Comstock, being duly sworn, says that he *is* a white male citizen of the United States, over the age of eighteen years, and not a party to or interested in the above-entitled action; that he served the annexed summons in said action on the thirteenth day of December, 1880, upon Patrick Cunningham, executor of the last will and testament of Mary Cunningham, deceased, therein named defendants," etc.

Proof of service of summons in a case by a person other than the sheriff is a condition precedent to judgment by default. If such proof is not made as required by law, the court acquires no jurisdiction of the persons of defendants, and has no authority to render judgment against them. Any judgment rendered is therefore invalid and void. *Weise v. Bennet*, 9 Pac. C. Law J. 626; *Howard v. Gallo-way*, 60 Cal. 10; *Maynard v. MacCrellish*, 57 Cal. 355. In this case the affidavit does not expressly state that the person making the service was over the age of 18 at the time of making the service. But it is claimed that the words "a white male citizen of the United States" denote an elector; that an elector is a male citizen 21 years of age and upwards; and as the person serving the summons was 21 years of age on the nineteenth of January, 1881, it follows that he was at the time of the service of summons, on the thirteenth of December, 1879, over 18 years of age.

It is true that a citizen, in the full acceptance of that term, may be said to be a member of the civil state, entitled to all its privileges. But the possession of all political rights is not essential to citizenship. *People, etc., v. De la Guerra*, 40 Cal. 311. The term has quite a comprehensive meaning. It includes citizens of the state and citizens of the United States, and these include political and civil citizens, electors and non-electors. Sections 50, 51, Pol. Code. Every male citizen of the state and of the United States is not necessarily an elector. It is provided, not only by the constitution of the state but by the constitution of the United States, that all male citizens, 21 years of age and upwards, shall be entitled to vote. But the affiant does not state that he is 21 years of age and entitled to vote. He may not be, and yet be a citizen. Presumptively, therefore, although a citizen of the United States over 18 years of age, he is a citizen under the age of 21 years, and therefore a non-elect. Section 60, Pol. Code.

The affidavit of service was insufficient to sustain the judgment. Judgment reversed, and cause remanded for further proceedings.

We concur: ROSS, J.; MCKINSTRY, J.

68 Cal. 39

COTHWIN v. FABER. (No. 9,265.)

Filed October 28, 1884.

PRE-EMPTION CLAIM—RIGHT OF ENTRY.

Where a person is permitted to enter on land pursuant to proceedings initiated by him at a period previous to such entry, and to pay for it, receiving from the government the appropriate evidence of payment, he acquires a right which relates back to the inception of the proceedings taken by him for its acquisition under the pre-emption law, and entitles him to the ultimate conveyance of the title to him.

Department 1. Appeal from the superior court of El Dorado county.

Chas. F. Irwin, for appellant.

A. P. Catlin, for respondent.

Ross, J. The case shows that in the month of November of the year 1872 the land in controversy was public land, and was then unoccupied, and subject to settlement and pre-emption under the laws of the United States; that at that time and under those circumstances the defendant, Peter Faber, possessing all the necessary qualifications, went into possession of and settled upon the said land for the purpose of making it his permanent residence, and to obtain the same by purchase from the United States under and by virtue of the pre-emption laws, and on the following day filed in the office of the register and receiver of the United States land-office, in the district in which the land was situated, his declaratory statement alleging his settlement and his desire to purchase the land, and setting forth all other matters required by law to be stated; that on the fourteenth day of May, 1875, said defendant proved up his claim to the land in the office of the register and receiver, under and in accordance with the rules of the United States land department, and then applied to enter the land. Upon the transmission of defendant's proofs to the commissioner of the land-office at Washington, that officer, on the seventh of September, 1877, held the land to be mineral in character, but subsequently, and in February, 1878, upon additional evidence touching its character, decided it to be agricultural, and on the fifteenth of May, 1878, said defendant was permitted to enter the land, and having paid therefor received from the proper officer the proper receipt.

Subsequent to the defendant's settlement upon the land in question, and after he had made proof of his claim thereto in the office of the register and receiver, to-wit, in the latter part of the year 1875, one Greene, in the state of Michigan, and one Lamar, in the state of Kansas, made affidavits as required by statute to obtain land under the act of congress granting additional homesteads to soldiers, and at the same time each of them signed an application in the form required by said act of congress, except that no description of any land

was given therein. Each, also, at the same time, together with his wife, signed and acknowledged a paper, purporting to be a power of attorney, appointing ——— their true and lawful attorney for them, and in their name, place, and stead, "to enter into and upon, and to take possession of, any and all pieces and parcels of land in the state of California which we may now own, or which we may hereafter acquire or become seized of, or in which we may now or hereafter be in any way interested, located under the provisions of the second section of the act of March 3, 1873, under which laws I am entitled to select and enter one hundred and twenty acres of land, in addition to my forty acres homestead; and we further authorize and empower said attorney to grant, bargain, sell, devise, lease, and convey, and confirm said land, or any part thereof, to such person or persons, and for such price, as to our said attorney shall seem meet, and for that purpose to execute any deed or conveyance thereof." No one was named in the instruments as attorney in fact. After the execution of these papers by Greene and Lamar, and prior to the first of January, 1878, the papers came into the possession of one Snow, in what way does not appear. Sometime in the latter part of 1877 one Farr "purchased said papers, and the right of said Greene and Lamar to locate land under said claim to an additional homestead." The papers were delivered by Snow to Farr, and thereupon the latter "filed in said application of Greene" with a description of one part, and "filed in said application of Lamar" with a description of the other parts of the land upon which Faber was settled, and which he had applied to enter, as already stated.

"Said applications and proofs were thereupon presented to the register of the United States land-office at Sacramento, California. Said register thereupon issued his certificates, which were deposited in the general land-office at Washington. Thereafter, on the first day of May, 1878, letters patent were issued by the government of the United States to the said Greene for the land described in his said application, and also letters patent were issued on the same day to the said Lamar by the government of the United States for the land described in his said application. Each of the said letters patent were delivered to the said Farr, and thereafter, on the twentieth day of May, 1878, Farr inserted in each of the powers of attorney—hereinbefore stated to have been signed and acknowledged by Greene and wife and Lamar and wife—the following words, to-wit: 'David Johnston, of the county of Sacramento, state of California.' Said Johnston thereupon, at the request of Farr, and in the name of Greene and Ruth Anne Greene, his wife, made, executed, and delivered to the plaintiff herein a good and sufficient conveyance of all the land described in the letters patent issued to said Greene, and on the same day the said Johnston, at the request of said Farr, and in the name of said Lamar and his wife, Susan Lamar, made, executed, and delivered to the plaintiff herein a good and sufficient conveyance of all the land described in the letters patent to Lamar."

Plaintiff's cause of action rests upon the deeds thus executed to him. Upon these facts we are of opinion that he is not entitled to recover the land from the defendant. When, on the fifth of May, 1878, defendant was permitted to enter the land pursuant to the pro-

ceedings initiated by him in 1872, and to pay for it, receiving from the government the appropriate evidence of payment, he acquired a right which related back to the inception of the proceedings taken by him for its acquisition under the pre-emption laws. The right thus acquired antedated the beginning of the proceedings under which the plaintiff claims, and secured defendant in the possession he had all along held of the land, and entitled him to the ultimate conveyance of the legal title to it. Judgment affirmed.

We concur: McKINSTRY, J.; McKEE, J.

PEOPLE *v.* BECKER. (No. 9,530.)

Filed October 28, 1884.

PHONOGRAPHIC REPORTERS IN CRIMINAL CASES—COMPENSATION.

On authority of *Ex parte Reis*, 12 Pac. C. Law J. 222, holding that superior courts in San Francisco have power to fix and order paid the compensation of phonographic reporters in criminal cases, and that the duty is imposed upon the county treasurer to pay the same on order of the court, judgment affirmed.

Department 1. Appeal from the superior court of the city and county of San Francisco.

The Attorney General and *C. B. Darwin*, for appellant.

Langhorne & Miller, for respondent.

By THE COURT. On the authority of *Ex parte Reis*, 12 Pac. C. Law J. 222, judgment affirmed.

66 Cal. 53

McCLOSKEY v. SWEENEY. (No. 8,483.)

Filed October 28, 1884.

PARTIES—INFANTS—PROCESS—GUARDIAN AD LITEM.

Where an infant over the age of 14 years is a party to an action, the court is not authorized to appoint a guardian *ad litem* to appear for him until after summons has been served on the infant, nor has the infant any power to nominate an attorney.

Department 1. Appeal from the superior court of the city and county of San Francisco.

J. D. Sullivan, for appellant.

J. B. Hart, for respondent.

MCKINSTRY, J. In the action, *James McCloskey v. Margaret Sweeney, Mary Sweeney, and James Sweeney*, the defendant last named—an infant over the age of 14 years—was not served with process. The infant was not authorized to nominate an attorney. Nor does the court have power to appoint a guardian *ad litem* to appear for the infant until after summons has been served on the infant. Code Civil Proc. 373; *Johnson v. S. F. S. Union*, 11 Pac. C. Law J. 481.

Judgment and order reversed, and cause remanded for a new trial.

We concur: ROSS, J.; MCKEE, J.

66 Cal. 41

HOGAN v. BLACK. (No. 7,870.)

Filed October 28, 1884

ASSIGNMENT OF CAUSE OF ACTION—NOTICE.

As between an assignor and assignee, the assignment of a cause of action transfers all of the assignor's interest in the subject-matter of the action, but the assignee cannot avail himself of the benefit of the same, as against the other party in the action, without notifying him of the assignment, or without having himself substituted for the plaintiff in the action. A settlement between the original parties, without notice by the other party of such assignment, is valid as against the secret assignee.

Department 1. Appeal from the superior court of the city and county of San Francisco.

J. M. Wood, for appellant.

J. H. Whittemore and George & Loughborough, for respondent.

MCKEE, J. Pending the action in hand for the foreclosure of a street assessment lien to satisfy a demand for work done under the street law of the city and county of San Francisco, the defendants settled the matter in suit with the plaintiff in the action by giving him a sum of money less than the amount demanded. Upon receiv-

ing the money the plaintiff satisfied the demand and canceled the assessment. But before doing so he had assigned and set over the cause of action to his attorney in the action, and the latter continued the prosecution of the action in the name of the plaintiff without notice to the defendants of the assignment to him, and when the defendants settled with the plaintiff they had no notice, actual or constructive, of any assignment by him. As between the assignor and the assignee, the assignment transferred the interest of the plaintiff in the subject-matter of the action, but the assignee could not avail himself of the benefit of the same against the defendants in the action without notifying them of the assignment, or without having himself substituted for the plaintiff in the action. Section 385, Code Civil Proc; *Doll v. Anderson*, 27 Cal. 249.

The settlement made by the defendants with the nominal plaintiff, without notice, actual or constructive, of any assignment of the cause of action, was therefore valid against the secret assignee, (section 368, *supra*;) and his only remedy, under these circumstances, was against the plaintiff in the action, and not against the defendants. Nor did he have any attorney's lien for costs in the action by which he could disturb the satisfaction of the demand, and the cancellation of the assessment by the plaintiff. *Mansfield v. Dorland*, 2 Cal. 507; *Russell v. Conway*, 11 Cal. 103.

Judgment and order affirmed.

We concur: ROSS, J.; MCKINSTRY, J.

SUPREME COURT OF CALIFORNIA.

RECLAMATION DIST. NO. 108 *v.* HAGAR. (No. 8,827.)

Filed October 28, 1884.

1. RECLAMATION STATUTES—CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT.

The statutes of California relating to formation of reclamation districts and levying of assessments, are not in conflict with the fourteenth amendment of the constitution of the United States, nor with the provisions prohibiting impairment of the obligation of a contract.

2. RECLAMATION DISTRICT—ASSESSMENT—APPORTIONMENT OF.

Whether or not the mode of assessment in a reclamation district is in accordance with proper apportionment, or equality of burden or benefit, is for the consideration of the legislative department, in the absence of a palpable violation of private rights.

3. SAME—ADDITIONAL ASSESSMENTS—BY-LAWS.

Where previous assessments are insufficient, additional levies on revised estimates are authorized, and by-laws adopted declaring "that no indebtedness shall be allowed to accrue in excess of the amount of assessment levied," cannot have the effect of preventing such additional assessments.

4. VALIDITY OF ASSESSMENT—IMPEACHMENT OF.

The nature of the indebtedness in a reclamation district is determined by the trustees, and by the board of supervisors in making the order for the assessment, and when determined to have been proper, and such as the law contemplated, the action of the trustees and board of supervisors cannot be contradicted or impeached in a suit to recover the assessment.

5. SAME—MANNER OF ASSESSMENT.

It is not essential to the validity of an assessment that it should have been made by a municipal corporation. *Hagar v. Supervisors Yolo Co.* 47 Cal. 222, affirmed.

6. PETITION—HEARING—ESTOPPEL.

A party being present at the hearing of the petition and making no objection, admits the truth of the facts stated in it, and is estopped to deny the same.

7. LEGISLATURE—DELEGATION OF POWER TO COUNTIES—EXTENT OF.

The legislature has power to confer on the board of supervisors of one county the power to include within a reclamation district any lands within another county.

8. ASSESSMENT—INTEREST RECOVERABLE.

The act of March 29, 1872, authorizes the recovery of interest on assessments in reclamation districts.

9. SAME—PARTIES.

Where an action for the assessment is brought in the name of the reclamation district instead of the people, and the real party in interest is the reclamation district, the substantial rights of the parties are not affected, and such error or defect will not be ground for a reversal.

In bank. Appeal from the superior court of Yolo county.

Belcher & Belcher, for appellant.

A. C. Adams and Jackson Hatch, for respondent.

SHARPSTEIN, J. This action was brought to recover of the defendant an assessment levied upon his land for reclamation.

1. The statutes of this state relating to the formation of reclamation districts, and the levying of assessments, require that, upon the

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presentation of a petition setting forth a description of the lands of which it is desired to have the district formed, with the names of the owners, (if known,) notice of the hearing shall be given by publication. After the formation of the district, no other or further notice to owners is required to be given; but proceedings are to be had for the election of trustees, making of by-laws, appointment of commissioners, the estimate of works and their cost, and the assessment of such cost upon the lands of the district, and no time, place, or manner is named for any opposition to be made. If an assessment remains unpaid, provision was made for the bringing of an action against the delinquent owner. The appellant claims that the statutes are in conflict with the fourteenth amendment of the constitution of the United States. Upon this point the supreme court of the United States and this court have decided adversely to the appellant. *Davidson v. New Orleans*, 96 U. S. 97; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701; S. C. 4 Sup. Ct. Rep. 663; *Reclamation Dist. No. 3 v. Goldman*, 4 West C. R. 97; S. C. 4 PAC. REP. 676.

2. Whether or not the mode of assessment was in accordance with proper apportionment, or equality of burden or benefit, was for the consideration of the legislative department, in the absence of a palpable violation of private rights. *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701; S. C. 4 Sup. Ct. Rep. 663. In the case before us, we cannot say that the burdens to be borne were not equal in proportion to benefits.

3. It is claimed that the law authorizing the assessment is in violation of section 10, art. 1, of the constitution of the United States, forbidding the passage of any law impairing the obligation of contracts, on the ground that the state, in accepting the grant under the "Arkansas act," assumed the burden of reclaiming the land, and cannot impose this burden upon its grantees. The case of *Hagar v. Reclamation Dist. No. 108*, *supra*, holds the contrary.

4. There is nothing in the point that the assessment is sought to be enforced in gold coin. *Hagar v. Reclamation Dist. No. 108*, *supra*.

5. A by-law adopted declared that "the trustees shall allow no indebtedness to accrue in excess of the amount of assessment levied." An indebtedness in excess of the first assessment accrued, and a subsequent assessment was levied to pay such excess, with other expenditures. It is urged that the subsequent assessment is therefore void. Section 34 of the act of 1868 authorized additional levies to be made, upon revised estimates, if the previous taxes should be insufficient. The by-laws authorized to be adopted were such as might be deemed necessary to effect the work of reclamation, and keep the same in repair. By-laws could not have the effect of forbidding the doing of that which the law expressly authorized to be done.

6. After the levy of two assessments, which were found to be insufficient, a third assessment of \$118,288 was levied. On the trial

of this case, the defendant offered to prove that of the indebtedness of \$118,288 (the amount of the third assessment) more than \$10,000, and of the indebtedness of \$192,046 (the amount of the second assessment) more than \$15,000, had been paid by the trustees for the services of attorneys, other than the district attorneys of the counties of Yolo and Colusa, in the prosecution of actions in the courts of this state for the enforcement of the first and second assessments. This evidence was objected to on the ground, among others, that the nature of the indebtedness was necessarily determined by the trustees in their statement to the board of supervisors to have been proper, and such as the law contemplated, and by the board of supervisors in making the order for the assessment, and that neither the determination of the trustees nor that of the board of supervisors can be contradicted or impeached in this suit. The objection was sustained. A like ruling was had upon a question asked as to how much of the \$118,288 had been paid for the expenses of procuring legislation in regard to the affairs of the district. That the ruling of the trial court was right, was decided by this court, November 29, 1879, in *Reclamation Dist. No. 108 v. Howell*, No. 6,348, and *Reclamation Dist. v. Howell*, No. 6,346. See, also, *Reclamation Dist. v. Hagar*, 6 Pac. C. Law J. 491, sustaining the same view.

7. The point that the assessment sought to be enforced in this action was not made by a municipal corporation, and was therefore unconstitutional and void, is admitted by appellant to be adverse to the decision of this court in *Hagar v. Supervisors of Yolo Co.* 47 Cal. 222, but we are asked to reconsider the question. We are not disposed to say that case is not correct.

8. The appellant claims that the assessment was void because, under the law authorizing it, lands within the district, belonging to the state as a private proprietor, were required to be and were exempt from the assessment. We are not referred to anything in the transcript showing that any lands in the district belonged to the state, nor that any lands were omitted from the assessment. The complaint alleged that no lands in the district were unsold, and this allegation was found by the court to be true. The petition presented to the board of supervisors was accompanied by a schedule, giving a list of the lands of the proposed district, with the names of owners so far as known; and on the hearing of that petition, the defendant, Hagar, being present, admitted the truth of all the facts set forth therein.

9. The point that the legislature could not confer on the board of supervisors of one county the power to include within a district any lands within another county, is not well taken. *Hagar v. Reclamation Dist. No. 108*, *supra*.

10. The act of March 29, 1872, (St. 1871-72, p. 696,) authorized the recovery of interest.

11. The assessment in question was valid according to the provisions of the act of March 28, 1868, as amended March 28, 1872. All

of the requirements of that act with respect to assessments were met and performed according to the averments of the complaint, which averments were by the court below found to be true. Upon the merits, therefore, the judgment appealed from is right. Must we reverse it only because it is brought in the name of the reclamation district, which, under every statute that has been passed with respect to the reclamation of lands, is the real party in interest? It is true that it has been decided here that actions brought under and in pursuance of the provisions of the act of 1868 were properly brought in the name of the people, (*People v. Hagar*, 52 Cal. 171, 190; *People v. Haggin*, 57 Cal. 579;) and, further, that actions brought under and in pursuance of the provisions of the Political Code must be commenced in the name of the reclamation district. *People v. Haggin*, 57 Cal. 579. The judgment in the case last mentioned was properly reversed on the ground first discussed in the opinion. But here the case resolves itself into the simple question whether we must reverse the judgment, otherwise valid, only because it is brought in the name of the reclamation district instead of the people, when, if the people were plaintiff, they would be merely formally so; the real party in interest all the time being the reclamation district. The legislature, by section 475 of the Code of Procedure, has declared that "the court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

Judgment and order affirmed.

I concur: Ross, J.

THORNTON, J., *concurring*. I concur in the above, except what is said in relation to the last point discussed. I think that the act of 1868 was repealed, as far as regards this point, by the 116th section of the act of March 30, 1874, (see amendments to the Codes for 1873-74, 60;) therefore, the action was properly brought in the name of the reclamation district. Pol. Code, § 3466; *People v. Haggin*, 57 Cal. 579. The proceedings in regard to the assessment substantially followed the provisions of the Political Code.

I therefore concur in the judgment.

McKINSTRY, J., *concurring*. I concur. With respect to the action being brought in the name of the reclamation district, I add: The complaint contains a statement of facts constituting a cause of action to enforce which the plaintiff (*quasi* a municipal corporation) is alone interested. It seems to be admitted that plaintiff is "the real party in interest," and the general rule is that an action must be brought in the name of the real party in interest. Code Civil Proc. 367. The statute has been construed as authorizing an action like

the present to be commenced in the name of the people of the state. *People v. Hager*, 52 Cal. 171. If it be conceded that the effect of the statute is to deprive plaintiff of its capacity to sue in its own name, the objection to its legal capacity could only be taken by special demurrer. Code Civil Proc. 430, 434. Nor is *People v. Haggin*, 57 Cal. 579, to the contrary. In that case it was assumed that the action was commenced under the Political Code, and the Political Code does not authorize such an action to be prosecuted in the name of the people of the state.

MYRICK and MCKEE, JJ., *dissenting*. We concur in the foregoing opinion in all respects, except as to the admissibility of evidence concerning the payment of attorneys' fees, and for procuring legislation; in those respects, we think, the evidence was admissible.

RECLAMATION DIST. NO. 108 v. HAGAR. (No. 8,708.)

Filed October 28, 1884.

RECLAMATION DISTRICT—VALIDITY OF ASSESSMENT.

On authority of *Reclamation Dist. No. 108 v. Hagar*, No. 8,827, *ante*, 945, judgment affirmed.

In bank. Appeal from the superior court of Yolo county. The facts in this case are the same as in *Reclamation Dist. No. 108 v. Hagar*, No. 8,827, *ante*, 945.

Belcher & Belcher, for appellants.

Adams & Treadwell, for respondents.

BY THE COURT. For the reasons given in the opinion in *Reclamation Dist. No. 108 v. Hagar*, No. 8,827, *ante*, 945, the judgment and order are affirmed.

RECLAMATION DISTRICT NO. 108 v. HAGAR. (No. 8,831.)

Filed October 28, 1884.

RECLAMATION DISTRICT—VALIDITY OF ASSESSMENT.

On authority of *Reclamation Dist. No. 108 v. Hagar*, No. 8,827, *ante*, 945, judgment affirmed.

In bank. Appeal from the superior court of Yolo county. The facts in this case are the same as in *Reclamation Dist. No. 108 v. Hagar*, No. 8,827, *ante*, 945.

Belcher & Belcher, for appellants.

Adams & Hatch, for respondents.

By THE COURT. For the reasons given in the opinion in *Reclamation Dist. No. 108 v. Hagar*, No. 8,827, *ante*, 945, the judgment and order are affirmed.

RECLAMATION DIST. NO. 108 *v.* HAGAR. (No. 8,684.)

Filed October 28, 1884.

RECLAMATION DISTRICT—VALIDITY OF ASSESSMENT.

On authority of *Reclamation Dist. No. 108 v. Hagar*, No. 8,827, *ante* 945, judgment affirmed.

In bank. Appeal from the superior court of Yolo county. The facts in this case are the same as in *Reclamation Dist. No. 108 v. Hagar*, No. 8,827, *ante*, 945.

Belcher & Belcher, for appellant.

Adams & Treadwell, for respondents.

By THE COURT. In general, the same points are presented on this appeal as in the case of *Reclamation Dist. No. 108 v. Hagar*, No. 8,827, *ante*, 945. On the authority of that case the judgment and order are affirmed.

RECLAMATION DIST. NO. 108 *v.* MARTIN. (No. 8,733.)

Filed October 28, 1884.

RECLAMATION DISTRICT—VALIDITY OF ASSESSMENT.

On authority of *Reclamation Dist. No. 108 v. Hagar*, No. 8,827, *ante*, 945, judgment affirmed.

In bank. Appeal from the superior court of Yolo county. The facts in this case are the same as in *Reclamation Dist. No. 108 v. Hagar*, No. 8,827, *ante*, 945.

Belcher & Belcher, for appellants.

Adams & Treadwell, for respondent.

By THE COURT. 1. The alleged error of the court in excluding a certified copy of the plat and field-notes, and the evidence offered in connection therewith, to show that the land had, in 1858, been offered at public sale by the United States and patented, was immaterial.

2. There is nothing in the point that the tax deed to Bullock was conclusive as to plaintiff's right to recover.

Therefore, and for the reasons given in the opinion in *Reclamation Dist. No. 108 v. Hagar*, No. 8,827, *ante*, 945, the judgment and order are affirmed.

(66 Cal. 59)

PEOPLE, etc., v. HAGAR, etc. (No. 8,675.)

Filed October 28, 1884.

1. RECLAMATION DISTRICT—BOARD OF SUPERVISORS—JURISDICTION OF.

The board of supervisors of a county, in hearing a petition for the formation of a reclamation district, have jurisdiction to determine what lands are to be benefited by a proposed system of reclamation, and to include them within the district, and it is not competent for a court, in a suit to recover the assessment, to determine whether or not such lands were benefited, or whether such benefit was or not of the value of the assessment.

2. FINDINGS—EVIDENCE.

Findings *held* sustained by the evidence.

In bank. Appeal from the superior court of Yolo county.

Belcher & Belcher, for appellants.

A. C. Adams, W. B. Treadwell, and J. C. Ball, for respondent.

BY THE COURT. Many of the points involved in this case are similar to points presented in *Reclamation Dist. No. 108 v. Hagar*, No. 8,827, *ante*, 945. Two points, however, not involved there are for consideration here: (1) There is evidence sufficient to sustain the finding that the allegation of the complaint, that the commissioners jointly viewed the lands of the district, was true; (2) the lands of the defendant consist of many parcels, sections, fractional sections, and subdivisions of sections, containing several thousand acres. The defendant offered to prove that of his lands which were assessed 522.13 acres were situated between the western base of the levee and the river, part occupied by the levee and part between the levee and the river; that 20 parcels are so situated, ranging from one acre to 114.48 acres; that said lands were not benefited by the works of reclamation, but were assessed at the rate of \$195.15 per acre.

This evidence was objected to for the reason, among others, that the offer was an attempt to contradict and impeach the assessment, by showing that the commissioners erred in their judgment in determining that each tract of land in the district was benefited to the same extent as all others in proportion to acreage, and that the several tracts were chargeable with the amounts severally assessed against them as returned by the commissioners. The board of supervisors, in hearing the petition for the formation of the district, and in making the order, had jurisdiction to determine what lands were to be benefited by the proposed system of reclamation, and to include such lands within the district, and their determination cannot now be inquired into. The trustees had authority to cause surveys, plans, location, and estimates of the cost of the work to be made, and the commissioners had authority to assess upon each and every acre within the district to be reclaimed or benefited, a tax proportionate to the whole expense, and to the benefits which would result from the works. Such jurisdiction and authority being given by the statute, we do not think it was competent for the court below to have deter-

mined that either of the parcels enumerated in the offer was not benefited, or that such benefit was not of the value of the assessment. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; MORRISON, C. J.; MCKINSTRY, J.; MCKEE, J.; THORNTON, J.; ROSS, J.

66 Cal. 61

WINANS v. SIERRA LUMBER Co. (No. 8,900.)

Filed October 28, 1884.

1. VERDICT—CONFLICTING EVIDENCE—NEW TRIAL.

Except for errors of law occurring at the trial, a verdict rendered upon substantially conflicting evidence will not be disturbed and a new trial granted.

2. FAVORABLE INSTRUCTIONS—ERROR—REVERSAL.

Instructions which are not prejudicial to a party, although erroneous, will not be ground for a reversal.

3. BREACH OF CONTRACT—NEGLIGENCE—DAMAGES.

In an action arising out of contract or tort, to recover damages for injuries, a recovery cannot be had if the injuries were consequent on negligence of the injured person which directly contributed to the injury. The law imposes on every one engaged in the performance of a contract the duty of doing all in his power to prevent injury from a breach by the other party, and to render damages as light as possible; and if he does not do so, the increased damage must fall upon him.

4. SAME—ESTOPPEL—PART PERFORMANCE.

The mere non-mention of a claim for a partial breach of a contract, at the time of settlement between the parties to the contract for work done, will not estop the party from setting up such claim.

5. SAME—MEASURE OF DAMAGES.

In an action to recover for breach of a contract, under which plaintiff agreed to manufacture lumber by means of certain machinery to be furnished by defendant, which machinery when furnished was inadequate, and by reason whereof plaintiff was not enabled to manufacture as much lumber as he could have done with proper machinery, the measure of damages was the contract price for the lumber which the plaintiff was so prevented from manufacturing, less the expense in manufacturing the same.

In bank. Appeal from the superior court of Tehama county.

Chipman & Garter and Mastick, Belcher & Mastick, for appellant.
J. Chadbourne and J. F. Ellison, for respondent.

MCKEE, J. Appeal from a judgment and order denying a motion for a new trial.

On the fifteenth of March, 1881, the Sierra Lumber Company, being the owner of some tracts of timber lands, two saw-mills, known as the Champion and Yellow Jacket mills, situate in Tehama county together with a lumber-yard and planing-mill, a water-flume, extending from the Champion Mill to its lumber-yard, and personal property used in connection therewith, made and entered into a contract with George Winans, the plaintiff to the action in hand, to deliver to

him possession of said property, including a specified number of teams and trucks for hauling logs, and to furnish him sufficient strap-iron and rails for a tram-way, and a suitable engine and cars for the tram-way. Winans agreed to construct the tram-way from the Champion to the Yellow Jacket mill at his own expense, and to operate the mills during the lumbering season of 1881, for manufacturing from the timber lands of the company lumber, which, when manufactured, was to be delivered at the lumber-yard to the company, who agreed to pay for the same, when delivered, nine dollars per thousand feet, and eight dollars per thousand feet for any undelivered lumber remaining at the mills on the first day of December, 1881, when the mill property was to be surrendered to the company.

The company furnished the two mills, with their equipments, the flume, the outfit for logging, and the iron for the tram-way to be constructed by the plaintiff; and the plaintiff entered into possession under the contract, constructed a tram-way, and operated the mills through the lumbering season of 1881, during which he manufactured five and one-half million feet of lumber, all of which the company received from him and settled for at the contract price. But the plaintiff charges that while he fully performed the contract on his part, the defendant on its part failed to fully perform it, in this: that it neglected and refused to furnish a suitable engine for the tram-way which he constructed. In fact, the company did furnish an engine, but the plaintiff alleges that it was wholly unsuitable for the tram-way "by reason of the peculiar make of its wheels," and would not work properly on the tram-way, and although repeatedly notified and informed of the fact, defendant refused to furnish a suitable engine, in consequence of which plaintiff was able to manufacture only five and a half million feet of lumber, when, if he had been furnished with a suitable engine for the tram-way, according to the contract, "he would have cut nine million feet at no greater costs or expense than he was put to in the manufacture of said five and a half million feet."

In answer to this, the defendant averred that the contract was for the manufacture of 7,000,000 feet of lumber, for which the company promised to pay nine dollars per thousand, and admitted that the plaintiff entered upon the performance of that contract, and commenced to construct the tram-way called for by the contract, but averred "that the plaintiff failed to build and complete about three and a half miles of the tram-way, and that the six and a half miles constructed by him were constructed with such short and irregular curves, and uneven and excessive grades, and in so unworkmanlike, insufficient, and defective a manner, that it could not be successfully worked by him, and was of little value when turned over to defendant at the end of the season."

The questions at issue, as raised by the pleadings, therefore, involved inquiries as to the contract under which the parties had acted,

—the plaintiff in constructing the tram-way, and the company in furnishing the engine,—and as to the character and sufficiency of the tram-way, and the suitability and sufficiency of the engine. It was conceded that the engine and tram-way did not work well together, but the great question was whether the faults which caused that result, and occasioned the loss of which the plaintiff complained, were in the engine or in the construction of the tram-way. As to the contract, there was given evidence tending to prove that it had been made by the plaintiff and the general superintendent of the company. It was admitted that both parties acted under the contract which was made, and each claimed to have fully performed it. The company gave evidence tending to show that the contract was for the manufacture of 7,000,000 feet of lumber; the plaintiff, that the contract was “to manufacture all the lumber he could.” Much evidence was also given in relation to the construction of the tram-way, and the suitability and sufficiency of the engine which the company furnished, and which the plaintiff used and operated in the performance of the contract. There was also evidence given tending to prove that the plaintiff had men, machinery, and force sufficient to operate the mills at their full capacity for the lumbering season of his contract, and that he could have manufactured during the season a greater quantity of lumber than he actually did.

The verdict was for the plaintiff, and, as it was rendered upon substantially conflicting evidence, it cannot be disturbed and a new trial granted, except for errors of law occurring at the trial; and the main matters urged on this appeal are errors of law occurring at the trial. The first relates to instructions given to the jury upon the question of the authority of an agent of a corporation to make a contract for the corporation. At the defendant's request the court had given the jury some instructions upon the subject of the ostensible authority of such an agent, and then quoted to them the language of sections 2315–2317 of the Civil Code, and, in connection therewith, substantially told them that the plaintiff would not be entitled to recover unless they found, as a fact, that the superintendent of the company had been authorized to contract for the company. The defendant excepted to the instructions, but the instructions, as given, were favorable and not prejudicial to the defendant. As to the performance of the contract by the parties the following was given:

“One of the parties to a contract cannot complain of a failure on the part of the other to perform, if his own laches or refusal to perform has contributed to defeat the object of the contract. Proof of perfection, however, in tram-way cars or engine is not required; only such as from the evidence you find that the parties contemplated such a tram-way, such cars, and such an engine, and only such, to fulfill the contract, as a prudent man, owning the timber and mills, would have made or furnished for himself, having in view present and future pecuniary profit.”

Defendant excepted to the latter portion of the instruction. We think it was not objectionable. In substance, it told the jury that,

to entitle either of the parties to their verdict, it was not necessary for the plaintiff to prove that he had constructed a perfect tram-way, nor for the defendant to prove that they had furnished a perfect engine. The contract only required such a tram-way or engine as, in the situation of the parties and in the light of surrounding circumstances, would be sufficient and suitable for the business in which they were about to engage. To the first part of the instruction the defendant did not object. In fact it was given at the request of the defendant; and, in connection with it, the court elaborately instructed the jury that if they believed from the evidence that the loss of which the plaintiff complained resulted from his own failure to perform his part of the contract, or from his negligence in constructing the tram-way, or in operating the engine which the company furnished, or from the want of ordinary care and caution either in operating the engine, or in constructing the tram-way, or in repairing the particular places where the injury was threatened or was likely to arise, he would not be entitled to their verdict, even if they found as a fact that the engine furnished by the defendant was defective and unsuitable for the tram-way.

The elaborate instructions which were given placed the right of the plaintiff to recover upon the ground that he himself must have been wholly free from fault, not only in performing his part of the contract, but in operating the engine which was furnished to him. And there is no doubt that a person who sues to recover damages for injuries in an action arising out of contract or tort, cannot recover if the injuries were consequent upon his own negligence which directly contributed to them. The law imposes upon every one engaged in the performance of a contract the duty of doing everything in his power to prevent loss to himself from a breach of the contract by the other party. If he cannot prevent it altogether, he must make reasonable exertions to render it as light as possible; and if, by his own negligence or willfulness, he allows the damages to be unnecessarily enhanced, the increased loss must fall upon him. *Hamilton v. McPherson*, 28 N. Y. 72. The question whether the loss of which the plaintiff complained was due to the laches of the plaintiff or to the non-performance of the contract by the defendant, was, therefore, properly put to the jury; and if the evidence satisfied the jury that the engine furnished by the defendant was so defective that the plaintiff was prevented from manufacturing the quantity of lumber which he could have manufactured with a suitable engine and thereby sustained a loss, he was entitled to recover, unless he had by his conduct estopped himself from maintaining the action.

There was evidence given of a settlement between the parties, after the close of the lumbering season of the year 1881, of the affairs and business of the parties in connection with the lumber manufactured and delivered under the contract. At that settlement the plaintiff made no mention of any claim or cause of action against the de-

defendant for a partial breach of the contract. But if the plaintiff had such a cause of action he was not bound to make it known at a settlement about the lumber actually manufactured, and the mere non-mention of it would not estop him from afterwards maintaining an action upon it. The instructions to the jury that the plaintiff would not be estopped unless they believe from the evidence that he, by his acts, declarations, or omissions, had intentionally and deliberately led the defendant to believe that the engine furnished was according to the contract, and that the defendant relied upon such acts, declarations, or omissions to its injury, were, we think, correct. And we think the court correctly instructed the jury that when the plaintiff discovered "that the engine was unsuitable for the tram-way he was not bound to rescind the contract, and make no further effort to carry out its purposes. He was at liberty to go on and manufacture all the lumber he could under the circumstances, and endeavor in good faith to carry out the contract; and by so doing he would not release or forfeit any claim for damages he might ultimately sustain by reason of any breach of the contract by the defendant." The contract was one susceptible of more or less performance; and if there was a partial breach of it by the defendant, the plaintiff had the right to continue to carry out the contract, reserving to himself the right to bring action for such damages as he may have sustained by the partial breach. If there was such a breach, resulting in loss to the plaintiff, the question then remained, what was the measure of damages? Upon that question the following instructions were given:

"For the breach of an obligation arising from contract, the measure of damage is the amount which will compensate the party aggrieved for all detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom:

"Where an action is brought to recover general damages for a breach of contract, the jury may take into their consideration any consequential damages which the plaintiff has sustained by reason of such breach, provided that such damages may fairly and reasonably be considered either as arising naturally—that is, according to the usual course of things—from the breach of the contract itself, or may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of a breach of it.

"If the jury believe from the evidence that the engine furnished by defendant to plaintiff was not of the make and description it had contracted to furnish him, and that the plaintiff duly notified the defendant of the defects in said engine, and of its unfitness for the purposes of said contract, and afterwards, without any default on his part, made every reasonable effort, in good faith, to accomplish the purposes of said contract, and to prevent loss or injury, but ultimately, by reason of the defendant's failure to furnish an engine of the kind and make agreed to be furnished, suffered damage, and was prevented from manufacturing lumber which he otherwise would have manufactured, then the plaintiff is entitled to recover, as damages, the contract price for the lumber which he was so prevented from manufacturing, less the expense he would have incurred in manufacturing said lumber, over and above the amount necessarily expended under the circumstances in manufacturing the amount actually manufactured by him."

We think these instructions were right. The contract being one susceptible of more or less performance, the damages sustained by an incomplete performance or partial breach were apportionable according to the extent of failure. That would cover the actual loss sustained, and the actual loss would be the profits which the plaintiff could have made upon a complete performance of the contract. *Utter v. Chapman*, 43 Cal. 283; *Upstone v. Weir*, 54 Cal. 124; *Hale v. Trout*, 35 Cal. 229. And these profits would be the product of the lumber which he was prevented from manufacturing by the partial breach of the contract and the contract price, less the expenses which would have been incurred in its manufacture.

There was evidence tending to prove that the plaintiff had made preparation for men and means to manufacture lumber to the extent of the capacity of the mills, and that with this force he could have manufactured, with a suitable engine, more lumber than he did manufacture. But defendant denied "that the plaintiff could have cut nine million feet of lumber at no greater cost or expense than he was put to in the manufacture of the lumber he in fact manufactured," and contended that the manufacture of any additional lumber would have involved the expense of cutting additional logs and making them ready to be hauled over the tram-way, and laying them at the mills for the purpose of manufacture, even if he had a force of men and logging teams employed for that purpose, and that such additional expenses should be deducted from the profits of any additional lumber which could have been manufactured. That contention was founded upon some evidence in the case, and it was fairly covered by the instruction that the plaintiff, if he was entitled to recover at all, was entitled to recover as damages the contract price for the lumber which he was prevented from manufacturing, less the expense he would have incurred in its manufacture "over and above," *i. e.*, separate from, the expense he had incurred in and about the lumber which he had actually manufactured. It was also contended that the value of the use of the tram-way and engine by the plaintiff for his individual benefit, at times which did not interfere with the performance of the contract, should be deducted from any damages sustained by the plaintiff. But that matter entered into the settlement between the parties as to the lumber actually manufactured, and the defendant admitted that the plaintiff had paid for the same.

Taken in connection with the evidence and pleadings in the case, we think the instructions as a whole correctly stated the law of the case, and presented the case fairly to the jury; and, as we find no prejudicial error in the numerous assignments of errors, the judgment and order are affirmed.

We concur: MYRICK, J.; SHARPSTEIN, J.; THORNTON, J.

66 Cal. 69

MURPHY v. HELMRICH and another. (No. 8,376.)

Filed October 31, 1884.

1. STATUTE OF FRAUDS—VERBAL CONTRACT—EFFECT OF WRITTEN ADMISSIONS.
Admissions in writing by the party to be charged, of a verbal contract of sale, are sufficient to take the contract out of the operation of the statute of frauds.
2. AGENT—PERSONAL LIABILITY—CONTRACT IN HIS OWN NAME.
Where, in executing a written instrument, an agent in terms imposes an obligation on himself without attempting to bind his principal, he, by such act, incurs a personal liability, though he describe himself as agent.

Department 1. Appeal from the superior court of the city and county of San Francisco.

Friedenrich & Ackmerman, for appellants.

C. J. Swift, for respondent.

McKEE, J. This was an action to recover the difference between the contract and market price of 100 shares of San Francisco gas stock, which the plaintiff claims to have sold to the defendants on the fifteenth of October, 1878. It is contended that the defendants are not liable, because there was no note or memorandum of the sale in writing, or subscribed by them, and therefore the sale was void, and because, in the transaction, they acted in the capacity of brokers for another person for whom they purchased, and not for themselves.

The promise by the defendants on the fifteenth of October to take the stock at the stipulated price was verbal. Next day the plaintiff sent word to the defendants that the stock was ready to be delivered to them, and to come and get it and pay for it. They declined to pay; but, in answer, wrote to the plaintiff as follows:

"The purchaser of the 100 shares of gas stock has not made his appearance, and it looks very much as if he was trying to back out. If you have accounted for the stock already, we will, of course, make the deficiency good; if not, would advise to do nothing in the matter, as there are to-day no buyers over 94c.
Yours, etc., HANSEN."

Written on the back of the note was the following:

"Will call as soon as I get a chance."

On the same day the plaintiff also received the following:

"I have not seen the purchaser of the 100 shares gas stock, but we guaranty that it is all right at 95½, and you can account for it to your buyer at that rate. But we shall probably only take the stock to-morrow, unless we meet the party. Will that be in order?

"Yours, etc.,

HANSEN."

After the receipt of those notes, the plaintiff tendered the stock to the defendants, at their place of business, and demanded the amount of the purchase money. They declined to take the stock or pay the money, but afterwards wrote the plaintiff as follows:

"OCTOBER 24, 1878.

"In the present state of the market for gas stock we have not as yet rec'd a satisfactory bid. We think, however, you had better sell the stock if you have an opportunity to do so. But we cannot understand why you should wish to sell it on our account, as we did not buy it on our account. Surely we thought the party that wanted the stock could be depended on, which we told you, acting as your agent and in your interest. Under no circumstances could we have acted any differently; but it appears unfortunately for the owner of the stock. We shall continue our effort, and remain,

"Yours, etc.,

HELMRICH & HANSEN.

"*Mr. Murphy, of the Pacific Bank.*"

Upon the receipt of this last note the plaintiff sold the stock in market for \$87.50 per share, and notified the defendants that he would look to them for the deficiency, but they refused to pay, and hence this action.

The defendants, by their answer to the complaint in the action, specifically denied the averments of the complaint, and set up that they acted in the transaction "solely as brokers and agents for others," and the only questions at issue were: (1) Did the defendants buy the stock as charged in the complaint? (2) Did they buy for themselves or as agents for another?

The evidence shows that there was a complete verbal contract of sale, which was followed by written admissions of the contract, signed by the defendants. These they signed by their own names, and not as agents for any other person whom they named as principal. In thus signing them they bound themselves as principals, even if they were acting for another, unless it was so understood and intended between them and their vendor. But their *memoranda* did not disclose the name of any principal, and there was no evidence given tending to prove that there was any other known person for whom they acted and intended to bind. Where an agent does not attempt in an instrument to bind his principal, and in terms imposes the obligation on himself, the rule is that he incurs by such act a personal liability, even although he described himself as agent. *Dayton v. Warne*, 43 N. J. Law, 659. This personal liability they assumed; for, while vaguely intimating that there was somebody for whom they were acting, they guarantied the plaintiff, as their vendor, that he would be paid the \$95.50 per share for the stock which they agreed to buy from him, and afterwards directed him to sell it and they would make good any deficiency. He accordingly sold the stock in open market and accounted to them. Under those circumstances they are not relievable from responsibility on the ground of agency for some unknown person.

"If a person," says Chancellor KENT, "would excuse himself from responsibility on the ground of agency, he must show that he disclosed his principal at the time of making the contract, and that he acted on his behalf so as to enable the party with whom he deals to have recourse to the principal in case the agent had authority to bind

him." "The agent becomes personally liable when the principal is not known, or when there is no responsible principal, or where the agent becomes liable by an undertaking in his own name, or when he exceeds his power." 2 Kent, Comm. 630, 631.

And such is the English law: "A man has a right to the character, credit, and substance of the person with whom he contracts. If, therefore, he enters into a contract with an agent who does not give his principal's name, the presumption is that he is invited to give credit to the agent; still more if the agent does not disclose his principal's existence." Anson, Cont. 345. See, also, Benj. Sales, 235, 52, 53.

We find no error in the record. Judgment and order affirmed.

We concur: MCKINSTRY, J.; ROSS, J.

66 Cal. 74

AMBROSE v. EVANS. (No. 8,353.)

Filed October 31, 1884.

1. STOCK CERTIFICATES—PLEDGE BY DEPOSITARY.

Certificates of stock cannot be recovered from the pledgee of a depositary by the real owner of the stock, who indorses and delivers the same to a third person, until the demand for which they were given in pledge is satisfied.

2. SAME—SALE BY PLEDGEE PENDING SUIT.

Where the pledgee sells the stock for more than enough to satisfy his demand, pending an action to recover possession of such certificates, the owner is not entitled to judgment for the excess, because it did not constitute any part of his cause of action.

Department 1. Appeal from the superior court of the city and county of San Francisco.

Roche & Desbeck, for appellant.

Sawyer & Ball, for respondent.

MCKEE, J. This was an action to recover 20 shares of railroad stock, or its value. The case shows that a corporation known as the Guatemala Central Railroad Company issued to W. G. Miller 50 shares of its stock, and Miller, being the owner of the same, indorsed and delivered it to Henry Toomey for safe-keeping. Toomey afterwards, viz., on the fourth of September, 1879, "cut up" the original stock, and delivered 20 shares of the same to Gomer Evans, the defendant in the action, as security for a loan of \$350. While Evans was the holder of these 20 shares, Miller, the original owner of the stock, by an instrument in writing, assigned the same, "together with all causes of action therefor," to Samuel Ambrose, the plaintiff in the action, who immediately notified Evans of the assignment, and demanded of him a return of the stock, but Evans refused to deliver the stock, and on the twenty-fifth of October, 1880, Ambrose

commenced the action in hand to recover the stock or its value, charging that Toomey had unlawfully transferred it, and that the defendant wrongfully retained the same. But the indorsement and delivery of the stock by Miller to Toomey clothed the latter with the *indicia* of the legal ownership of the stock, so as to enable him to deal with it as his own; and when he, as owner, pledged the 20 shares as security for the payment of a debt which he owed to Evans, the transaction was legal, and the transfer of the stock for that purpose vested the pledgee with a right to it as security for the money advanced. Evans, therefore, as holder of the stock in pledge, was rightfully in possession of the stock when Ambrose demanded it of him, and when this action was commenced, and he was entitled to hold it until the demand for which he had it in pledge was satisfied.

It is said, however, and the court finds, that the pledgee sold the stock in open market, and realized from the sale the sum of \$550 over and above the amount necessary to satisfy his demand, and that he wrongfully claims this surplus, and refuses to pay it to the plaintiff, who is entitled thereto. But this sale, as found by the court, was made on the sixth of November, 1880, after the commencement of the action in hand; and, while it is true that the surplus which remained in the hands of the pledgee after the satisfaction of his demand did not belong to him, the plaintiff was not entitled to recover it, because it did not constitute any part of his cause of action.

The judgment is, therefore, erroneous. Judgment and order reversed, and cause remanded for further proceedings.

We concur: MCKINSTRY, J.; ROSS, J.

2 Cal. Unrep. 390

ALEXANDER v. MUNICIPAL COURT OF APPEALS. (No. 7,130.)

Filed October 31, 1884.

1. CERTIORARI—REHEARING NOT PERMISSIBLE AFTER JUDGMENT.

Certiorari cannot be used to review an error or irregularity committed in exercise of a court's jurisdiction. A rehearing after judgment, on a writ of review, cannot be had in the lower court. The question upon the return of the writ is whether the court, whose judgment is the subject-matter of review, pursued its jurisdiction, and the judgment on that question is reviewable only on appeal.

2. MUNICIPAL COURT OF APPEALS—DISMISSAL OF APPEAL.

A dismissal of an appeal from the justice's court, taken on questions of law and fact, by the municipal court of appeals of the city and county of San Francisco, after the cause has been placed on the calendar by stipulation of the parties, if the appellant fails to appear at the trial, although no notice of a motion to dismiss has been given, though irregular, is not reviewable on *certiorari*.

Department 1. Appeal from the superior court of the city and county of San Francisco.

v.4,no.23—61

R. P. Wright, for appellant.

J. Rothchild, for respondent.

MCKEE, J. Appeal from a judgment in proceedings on a writ of review, affirming an order made by the late municipal court of appeals of the city and county of San Francisco, dismissing an appeal, and from an order setting aside an order granting a rehearing. The order dismissing the appeal was made by the municipal court of appeals in a case pending before it, on an appeal taken from the judgment of a justice's court on questions of both law and fact. While the case was there pending the parties stipulated in writing that it be placed on the calendar of the court for trial, and that was done; but on the calling of the case in its order on the calendar for trial, the appellant did not appear, and the court, upon motion of respondent, ordered that the appeal be dismissed for want of prosecution. That order was made and entered without proof of service of notice of the motion upon the appellant; and it is contended that the court exceeded its jurisdiction in making the order without proof of such service.

The contention is founded upon section 980, Code Civil Proc. That section, as it existed at the time of the proceedings which are called in question, provided :

"Upon an appeal heard upon a statement of the case, the county court may review all orders affecting the judgment appealed from, and may set aside or confirm or modify any or all of the proceedings subsequent to and dependent upon such judgment, and may, if necessary or proper, order a new trial. When the action is tried anew, on appeal, the trial must be conducted, in all respects, as trials in the district court. The provisions of this Code as to changing the place of trial, and all the provisions as to trials in the district court, are applicable to trials on appeal in the county court. For a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the county court, after notice, may order the appeal to be dismissed," etc.

These provisions regulated the practice of the court in (1) cases where appeals were taken on questions of law alone; (2) where appeals were taken on questions of both law and fact; and (3) where there was failure to prosecute the appeal, or unnecessary delay in bringing it to a hearing. The last case arose where an appellant failed to do any of the acts required by section 977, Code Civil Proc., in perfecting his appeal, or in causing the papers in the case to be transmitted and filed in the appellate court. For any omissions or unnecessary delay in the performance of the requisite acts, the respondent in the case was entitled, after notice to the appellant, to have the appeal dismissed. But, in the case under review, there was no failure to prosecute the appeal and no unnecessary delay in bringing it to a hearing; for the papers in the case were promptly transmitted to and filed in the appellate court, and the parties stipulated in writing that it should be heard as soon as it was reached in its order upon the calendar of the court. The appeal was, therefore, not one of the class of cases dismissible upon notice for failure to prose-

cute the appeal, or for unnecessary delay in bringing it to a hearing; it was an appeal ready to be heard and determined on the questions of both law and fact on which it had been taken. If heard on questions of law, the appellant was the actor; if on questions of fact, the plaintiff in the action, although respondent on the appeal, was the actor; and, when the case was called for trial, the burden of proof was upon him to make out his case, whether the appellant appear or did not appear. Regularly, therefore, the respondent, when the case was called for trial *de novo*, ought to have proceeded with the case and taken a judgment. Instead of taking that course he moved to dismiss the appeal. Assuming that that was an irregular proceeding, it did not affect the jurisdiction of the court over the appeal. In the exercise of its appellate jurisdiction the court had authority to hear and determine the motion to dismiss. The fact that the motion was made without notice to the non-appearing appellant was not jurisdictional. The decision of the motion without requiring proof of notice of the motion may have been error; but, if so, it was error within the jurisdiction of the court, and an error or irregularity committed in the exercise of jurisdiction is not reviewable on *certiorari*. Therefore, the judgment on the writ of review, affirming the order of the municipal court, was correct; but the subsequent order granting a rehearing on the writ was incorrect, and it was proper for the superior court to set aside that order.

There is no such thing as a rehearing after judgment on a writ of review. The case is heard upon the return made to the writ; and the only question upon the return is whether the court, whose judgment or order is the subject-matter of review, pursued its jurisdiction. Section 1074, Code Civil Proc. The judgment rendered on that question is reviewable only on appeal. Judgment and order affirmed.

We concur: ROSS, J.; MCKINSTRY, J.

1. SALARY OF OFFICIAL—ASSIGNMENT BEFORE DUE—VALIDITY.

An assignment by an official of his salary before it becomes due is contrary to public policy and void.

2. APPEAL—EXCEPTIONS.

Where appellant did not except in the court below to orders consolidating actions and providing for interventions, he cannot on appeal complain that the same were irregular, nor can he complain that he was injured, because the court has no jurisdiction to make such orders, if, upon the findings, he was not entitled to a judgment in his favor.

Department 1. Appeal from the superior court of the city and county of San Francisco.

Sidney V. Smith & Son, for appellant.

Clitus Barbour, for respondents.

McKINSTRY, J. The respondents have not appeared nor filed any points in this court.

1. Appellant contends that the English rule, which holds that an assignment by an official of his salary before it becomes due is contrary to public policy and void, has no application in the condition of things in this country. It was so held in *State Bank v. Hastings*, 15 Wis. 78. On the other hand, it was decided by the court of appeals of New York that such an assignment was against public policy and void. *Bliss v. Lawrence*, 58 N. Y. 442. We think the conclusion of the New York court is sustained by the more satisfactory reasoning.

2. Each of certain deputies and copyists in the office of the clerk of the city and county of San Francisco (in the early part of the month of July, 1881, or before the commencement of that month) delivered to the clerk a writing purporting to be a *demand* upon the treasury of said city for his compensation or salary, as for said July, and having indorsed thereon the words "received payment," subscribed with the name of such deputy or copyist. The writing was immediately, and before the salary was due, delivered by the clerk to the petitioner for a valuable consideration. It is contended by appellant that the defendant Dunn, the auditor, is estopped from setting up a want of authority on the part of the clerk, (Stuart;) that if Stuart committed a fraud upon his deputies and copyists by negotiating or assigning the demands, it was a fraud which they gave him the power and helped him to commit, and they should suffer who conferred on the clerk the ostensible authority to deal with the demands. But the plaintiff received the demands "in the early part of July," and before the respective salaries for that month were earned. He thus took part in a transaction contrary to public policy, and must be held to have knowingly contravened the law.

3. The orders of the court below consolidating certain actions and directing or providing for interventions were irregular. Code Civil Proc. 387, 1048. But appellant did not except to the orders. Even if it should be conceded that the court below had no jurisdiction to make the orders, appellant was not injured by them, if, upon the findings, he was not entitled to a judgment in his favor. Judgment affirmed.

We concur: ROSS, J.; McKEE, J.

66 Cal. 76

LEHN v. CITY AND COUNTY OF SAN FRANCISCO. (No. 8,500.)

Filed October 31, 1884.

1. DAMAGE FOR FLOWING SEWAGE ON PRIVATE LAND.

A city will be responsible in damages for flowing sewage on the land of a private owner, and cannot excuse itself by the fact that the *plan* adopted by the board of supervisors for the construction of sewers provided that they should be left open at the places through which their contents flowed onto the plaintiff's land.

2. CITY AND COUNTY OF SAN FRANCISCO — DEMAND — PRESENTATION TO SUPERVISORS.

Section 4072 of the Political Code is inapplicable to the city and county of San Francisco, and therefore it is not required that a claim or demand against that municipality should be presented to the board of supervisors before suit can be brought upon it.

Department 1. Appeal from the superior court of the city and county of San Francisco.

J. F. Cowdery, for appellant.

M. G. Cobb and Saffold & Menz, for respondent.

McKINSTRY, J. 1. The defendant is responsible for damages caused as alleged in the complaint, even if it was part of a *plan* adopted by the board of supervisors that the sewers mentioned in the complaint should be left open at places through which their contents flowed onto the plaintiff's land. *Guerin v. San Francisco*, No. 6,090; *Jessup v. San Francisco*, No. 6,842.

2. Section 4072 of the Political Code is inapplicable to the city and county of San Francisco. Pol. Code, 4087. No section or clause of the statutes which constitute the charter of San Francisco requires a claim or demand against the municipality to be presented to the supervisors before suit can be brought upon it. In *People v. Supervisors*, 28 Cal. 431, it was intimated, although the point was not involved in the determination of the case, that the provisions of the act of 1855, which made the presentation of a claim against a county to the supervisors and its rejection by them a prerequisite to a suit upon it, applied to the city and county of San Francisco. Even if that case could be held to be authoritative as to the point prior to the adoption of the Codes, the act of 1855 was repealed by the Political Code, and, as we have seen, the clause of that Code as to presentation is expressly declared to be inapplicable to San Francisco. Judgment affirmed.

We concur: McKEE, J.; ROSS, J.

SUPREME COURT OF CALIFORNIA.

(2 Cal. Unrep. 393)

PEOPLE v. LYLE. (No. 10,988.)

Filed October 31, 1884.

1. CRIMINAL PRACTICE—JURORS—MISCONDUCT OF SETTING ASIDE VERDICT.

The legal presumption is that jurors perform their duty, and that presumption is not overcome by proof of the mere fact that, during a trial which lasted over thirty days, two or three of the jurors, after the adjournment of the court for the day, drank a few glasses of liquor at the expense of the district attorney, or that one of them took dinner at his house under circumstances rendering the act of invitation necessary, or took supper with counsel under similar circumstances. To set aside a verdict and grant a new trial on the ground of irregularities or misconduct of the jury, it must be either shown as a fact or presumed as a conclusion of law that injury resulted from such irregularity or misconduct, and where there has been no injury the verdict will not be disturbed.

2. SAME—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—IMPEACHING WITNESS.

Alleged newly-discovered evidence of a fact known at the trial as to a matter about which one of the witnesses testified, is no ground for a new trial.

3. SAME—APPEAL—OBJECTION NOT RAISED IN LOWER COURT.

Where no objection is taken to irregularities on the trial, the matter cannot be raised on appeal.

Department 1. ¶ Appeal from the superior court of Contra Costa county.

Atty. Gen. Marshall, for respondent.

Mills & Jones and E. J. Emmons, for appellant.

McKEE, J. Appeal from an order denying a motion for a new trial, and from a judgment of conviction of murder in the second degree. The motion was made upon statutory grounds, but the case itself has been argued and submitted mainly upon one of them, namely, misconduct of the jury by which a fair and due consideration of the case was prevented. The alleged misconduct consisted of certain acts committed during the progress of the trial by the district attorney, his associate counsel, and some of the jurors. The acts were: That during the trial the district attorney, at his expense, treated some of the jurors to intoxicating liquors; that he presented one of them with a bottle of bitters, entertained him at his house with a dinner, and after dinner escorted him homeward; and that during the trial he and his associate counsel, at their expense, entertained the same juror and also a witness in the case at an oyster supper at which liquors were drank.

The affidavits read on the hearing of the motion show: That the trial of the case lasted over a month, commencing on the tenth of December, 1883, and ending, with intermissions, on the eleventh of January, 1884; that at each adjournment the jury were allowed to separate under the instructions of the court; that during the recesses and adjournments of the court it was the practice of counsel engaged

in the trial of the case,—as well those for the defense as those for the prosecution,—jurors, and witnesses to “interchange courtesies” by treating and drinking with some of the jurors at the bars of saloons. Twice during the progress of the trial the district attorney treated two or three of the jurors. Once he invited to dinner one of them, who was at his house to get from him a bottle of bitters which he had promised the juror two months before, and on another occasion the same juror took supper with the district attorney and his associate counsel, under circumstances which rendered his invitation to supper unavoidable, except by a violation of the law of social intercourse. The acts of drinking and the entertainments of the juror were all done in the recess or adjournments of the court, and at considerable intervals of time. On none of the occasions does it appear that there was any conversation between juror or jurors and counsel, or any of the persons present, about the case or the trial thereof, or the defendant, or anything in connection therewith. On the contrary, the affidavits clearly show that there was not a word spoken nor the slightest allusion made to the trial, or any of the parties connected with it, at either of the entertainments, or on the occasions of drinking at the bars of saloons. It may be conceded that acts of ordinary and neighborly kindness, or of hospitality, to jurors sitting in the trial of a case,—especially one of a criminal nature by attorneys engaged in the trial,—are “more honored in the breach than the observance.” The exercise of such acts during the progress of such a trial serves to place the parties performing them in a position capable of being injuriously interpreted by those who may be adversely interested in the trial, or who may be watching it from the stand-point of sympathy or feeling with the litigants, and in that way confidence in judicial proceedings may be affected; but in themselves, unaccompanied by words or circumstances tending to show improper motives, or that a bias might have been created in the minds of any of the jurors which injuriously affected the person against whom the verdict was rendered, they do not justify an inference that the jury were influenced by them in making up their verdict.

The legal presumption is that jurors perform their duty in accordance with the oath they have taken, (*People v. Williams*, 24 Cal. 31,) and that presumption is not overcome by proof of the mere fact that during a trial, which lasted over thirty days, two or three of the jurors, after the adjournment of the court for the day, drank a few glasses of liquor at the expense of the district attorney; that one of them partook of a dinner at the house of the same officer, under circumstances which rendered the act of invitation necessary; and of a supper at the hotel of his associate counsel, under like circumstances. Such acts, however improper or indiscreet, could not, in themselves, have affected the impartiality of any one of the jurors, or disqualified him from exercising his powers of reason and judgment; and they will not warrant a court in setting aside a verdict. “While the law,”

says Chief Justice SHARKEY, "is rigidly vigilant in guarding and preserving the purity of jury trials, yet it will not, for light or trivial causes, impugn the integrity of juries, or question the solemnity and impartiality of verdicts." *Hare v. State*, 4 How. (Miss.) 187. It is the settled rule that to warrant the setting aside of a verdict and granting of a new trial, upon the ground of irregularities and misconduct of a jury, it must be either shown as a fact, or presumed as a conclusion of law, that injury resulted from such misconduct. When it is clear that the party against whom the verdict has been found was not injured by the misconduct, the verdict will not be disturbed.

There is nothing in *People v. Gray*, 61 Cal. 164, which conflicts with this conclusion. In that case the jury had, during the trial, drank freely, if not grossly, of liquors procured by themselves. Upon the submission of the case to them for their deliberation some of them took bottles of whisky with them into the jury-room, and there was evidence tending to show that one of them, while deliberating on the verdict, drank so much as to unfit him for the proper discharge of duty. There is no doubt that the actual drunkenness of a juror will always vitiate a verdict. But here there is no showing that any juror was under the influence of liquor while on duty, or that any liquor was drank at any time while on duty; and there is nothing in the acts charged from which the court could reasonably infer that they, in the slightest degree, influenced the result.

There is no basis for the charge that the sheriff improperly spoke to one of the jurors about the evidence in the case. The alleged newly-discovered evidence of a fact known at the trial, as to a matter about which one of the witnesses testified, is no ground for a new trial. No diligence is shown for not using the fact as evidence. Besides, it merely tended to impeach the evidence of the witness on a former trial; and a new trial is not grantable for merely impeaching evidence. There was no objection taken to the alleged transgression of the district attorney in the argument of the case. The court itself interposed to stop it, and the attorney desisted. There was no error in the charge of the court. Judgment and order affirmed.

McKINSTRY and ROSS, JJ. We concur in the judgment, and in the conclusion reached in the foregoing opinion.

2 Cal. Unrep. 397

CHAFFEY v. DEXTER. (No. 9,695.)

Filed November 1, 1884.

1. ATTORNEY AND CLIENT—COMPROMISE—FINDINGS.

Where the matter of a compromise was talked over between a client and his attorney, and the attorney did compromise on the terms which he supposed his client assented to, a finding is justified that the client authorized his attorney to compromise as he did.

2. APPEAL—FINDINGS—WEIGHT OF EVIDENCE.

Whether an attorney correctly understood his client, regarding his desires as to a compromise, is a question depending on the weight of evidence, and, the question being in doubt, the finding of the lower court will not be disturbed.

Department 2. Appeal from the superior court of San Bernardino county.

H. M. Willis, for appellants.

Paris & Goodcell, for respondent.

SHARPSTEIN, J. The plaintiffs, George and William B. Chaffey and the Pomona Land & Water Company, brought an action against the defendant for the diversion of a large portion of the water of San Antonio creek, which flows over the plaintiffs' lands. The defendant denied the material allegations of the complaint, and alleged that he was the owner of the exclusive right to use and control 40 inches, measured under a four-inch pressure, of the water of said stream for the purpose of irrigation, etc. The answer was filed on the fifteenth of October, 1883. On the twelfth of February, 1884, a judgment was entered in accordance with a written stipulation of the attorneys of the several parties, by which it was adjudged and decreed that the plaintiffs were entitled to the use and control of all the water flowing in said creek, with the exception of 20 inches, measured under a four-inch pressure, which the defendant was entitled to use and control. On the twenty-eighth of March, 1884, plaintiffs' attorney gave defendant's attorney notice that the plaintiffs would move the court that said stipulation, and said judgment entered in pursuance thereof, be set aside, "on the ground that the said stipulation was made under mistake, inadvertence, and excusable neglect of attorney for plaintiffs, H. M. Willis, and without any authority on his part, and upon representations upon which he relied, made by one Towner, attorney for the Pomona Land & Water Company, one of the plaintiffs;" and that the motion would be made on the papers in the case and upon affidavits.

By the affidavit of Mr. Willis it appears that, at some time intermediate the date of the commencement of the action and the entry of the judgment, he had a conversation with the plaintiff George Chaffey, Jr., in regard to a compromise of the action on the terms as he (Willis) understood, expressed in the stipulation which he subsequently entered into with the defendant's attorney. We refer to the following clause in said affidavit:

"That in a previous conversation with his client, George Chaffey, Jr., the proposition of allowing twenty inches of water to defendant was discussed between them, but deponent did not understand his client in the way said client, as he now informs him, intended to be understood, to-wit, that they were willing to allow, as a compromise, the defendant to have the amount of a certain box or flume leading from said creek mentioned in the pleadings to defendant's farm—said box or flume containing about twenty inches of water—to be used by him (defendant) on his land exclusively adjacent to said stream, at stated periods, about once a week; that the deponent had no authority, in writing or verbal, from his client in relation to said compromise, but acted solely in said matter on his understanding of his client's wishes, and upon representations made to him by said Towner."

From this it appears that the matter of a compromise was talked over between the client and his attorney, and that the attorney did compromise on the very terms to which he supposed his client had assented. We think, upon this evidence, the court was justified in finding that the client authorized his attorney to compromise as he did. Whether the attorney correctly understood his client is a question which is left in doubt, and that being so we cannot disturb the order of the court below. The attorney undoubtedly acted according to his understanding of his client's wishes as expressed by the client himself. Order affirmed.

We concur: THORNTON, J.; MYRICK, J.

66 Cal. 83

WHEELER v. BOLTON. (No. 8,488.)

Filed November 6, 1884.

PRACTICE—NONSUIT—SETTING ASIDE—EVIDENCE.

Where a court erred in excluding testimony which plaintiff offered to maintain the issues made by the pleadings, and granted a nonsuit, it was proper for the court to afterwards set aside the nonsuit and order a new trial, if the evidence offered to maintain such issues was, in itself, admissible.

Department 1. Appeal from the superior court of the city and county of San Francisco.

Daniel Rodgers, for appellant.

B. S. Brooks, for respondent.

MCKEE, J. On the trial of this case the court excluded the testimony which the plaintiff offered to maintain, on her part, the issues made by the pleadings in the case, and granted a nonsuit, but afterwards set aside the nonsuit and ordered a new trial. From the order granting a new trial the defendant appeals. Presumptively, the order was correct. But the appellant contends that it is erroneous, because the evidence offered by the plaintiff to maintain her cause of action was clearly inadmissible for that purpose. The cause of action

was this: On the seventh of September, 1850, William L. Carman died in the city of San Francisco, seized and in possession of a tract of land, described in the complaint by metes and bounds, containing 72 acres of land, situate in the city and county of San Francisco, near the Mission Dolores. At the time of his death Carman left a last will and testament, which was admitted to probate, and the defendant and one Theodore Adams were appointed executors of the will. As such they qualified and administered the estate, and, upon a settlement of their final accounts, the probate court, on the seventeenth of April, 1876, "adjudged and decreed that the real estate, as described in the inventory of said estate, and the account therein, filed on the tenth day of June, 1852, be, and the same is hereby, distributed, to-wit: "Seventy-two (72) acres of land, situated at the Mission Dolores, to which the deceased held a pre-emption right, be, and the same is hereby, distributed to Margaret C. Wheeler, sole legatee, under and by virtue of the will of William L. Carman, deceased."

The descriptive clause of the decree contains the description of the land as it was inventoried and subsequently accounted for in one of the annual accounts of the executors. By the decree the plaintiff claimed to be entitled, as sole distributee, to the tract of land *as described in the complaint*. But she charged that it had been lost to the estate and to her by the inexcusable negligence of the defendant, as one of the executors of the estate, and therefore she sued to recover its value. In answer to her complaint, the defendant denied seizin or possession by the testator of the tract of land described in the complaint, knowledge or possession of it by the executors, or that they were chargeable therefor, and specifically denied all charges of negligence, etc. One of the questions, therefore, was whether the land described in the complaint was a part of the estate of the testator, which came to the knowledge and possession of his executors. Upon that question the plaintiff offered in evidence the decree of distribution, accompanying the offer with the statement that she would follow it up by the oral testimony of witnesses, to the effect that the 72 acres of land, as described in the decree, were known as a tract of land bounded as set forth in the complaint; that the testator died in the actual occupation of said tract; and that the defendant, as executor, took possession of the same as the property of the estate.

The decree constituted the basis of the plaintiff's right to recover. *Wheeler v. Bolton*, 54 Cal. 302. If it was void, the court properly excluded it as evidence. If it was valid, the court erred in excluding it, and the order granting a new trial was correct. It is not claimed that the court that rendered the decree had not jurisdiction to render it; but the contention is that the description of the land attempted to be distributed by the decree did not attach to any particular tract of land, and that the land distributed is not the land described in the complaint. It is observable that the decree distributes to the plaintiff "72 acres of land, situated at the Mission Dolores, to which the

deceased held a pre-emption claim." In 1850 the pre-emption laws had not been extended over California; there could, therefore, have been no "pre-emption claim" to the land in a legal sense; but the term "pre-emption" was merely a false designation of a possessory right, which possessory right, at that time, under the laws of the state, was recognized as property and the subject of sale, etc.

As a false designation, however, it does not prejudice the other particulars of the description. Sub. 1, § 2077, Code Civil Proc. The decree, therefore, distributed whatever interest the testator had in a tract of land containing "72 acres, situated at the Mission Dolores, to which the testator had a pre-emption right." In itself that would be considered insufficient to attach to any particular tract of land, but it is a description which may be capable of identification by extrinsic evidence. And, assuming that it was proved, as the plaintiff offered to prove, that the testator died in possession of 72 acres of land near Mission Dolores, to which he had or claimed to have had a possessory right, and that that land came to the knowledge and possession of the executors of his estate, and that it was inventoried and appraised as part of the estate, and accounted for by the executors in one of their annual accounts to the probate court, and that the land thus described and known is the identical land described in the complaint by metes and bounds, such proofs would go far towards rendering certain the description of the land in the decree, and identifying it with the land described in the complaint. The evidence was therefore admissible. It is well settled that when the meaning of a will or other written instrument is certain and intelligible, the subject or object to which it is to be applied may be ascertained by extrinsic evidence, and when so ascertained will be taken as the meaning of the parties. *Case v. Young*, 3 Minn. 209, (Gil. 140;) *Morgan v. Burrows*, 45 Wis. 211; *Stanly v. Green*, 12 Cal. 148; *Bruck v. Tucker*, 32 Cal. 425.

We think the court erred in excluding the evidence offered by the plaintiff, and that it properly ordered a new trial. Order affirmed.

We concur: McKINSTRY, J.; ROSS, J.

66 Cal. 80

In re Estate of HOPPER. (No. 8,609.)

Filed November 6, 1884.

DEVISE—AFTER-ACQUIRED PROPERTY.

A provision in a will making a devise of property of which the testator was not the owner at that time, will be valid, and given effect, where the testator subsequently acquired the title to the property, if it is clearly manifest, from the reading of the will, that the testator intended to dispose of all the property he should leave at the time of his death.

Department 1. Appeal from the superior court of the county of Napa.

Spencer, Henning & Stanley and Stoney & Hayes, for appellant.

J. J. May, E. W. McGraw, Crouch & Johnson, and A. J. Hall, for respondent.

Ross, J. Charles Hopper, on the first of April, 1868, made his last will and testament, which contained a devise to his son Thomas in these words: "I give, bequeath, and devise to my son Thomas B. Hopper that portion of real estate he has inclosed and now has in his possession, supposed to be one hundred and forty (140) acres, more or less." At the date of the will Thomas B. Hopper had inclosed and in his possession a portion of his father's land, containing about 140 acres. On the fourteenth of June, 1870, the testator sold and conveyed 18 acres and a fraction of this tract to one Baldwin, which portion, for convenience, will be referred to as the Baldwin tract, and on the twenty-first of February, 1871, sold and conveyed to one Forbes 18 acres thereof. On the fourth of October, 1871, the testator executed a codicil to his will, by which certain provisions of the will were altered, but which did not interfere with the devise to Thomas B. Hopper. On the nineteenth of July, 1872, the testator repurchased the Baldwin tract, and thereupon entered into possession of it and remained in possession and seized in fee thereof until his death. On the twenty-fifth of January, 1878, the testator conveyed to his son Thomas by deed that portion of the property devised to him not embraced in the conveyances to Baldwin and Forbes. After the death of the testator, which occurred on the twenty-fourth of September, 1880, his will, with the codicil, was duly admitted to probate, and administration upon his estate duly had. Upon the final distribution of the estate the question involved in this appeal arose. That question is, who is entitled to the Baldwin tract—Thomas B. Hopper or the residuary legatees?

According to the rule of the common law, after-acquired real estate did not pass by a will; and this rule was enforced so strictly that a will was held to be inoperative upon real estate of which the testator was the owner at the time of the making of the will, and afterwards sold, repurchased, and died seized,—which is the exact case at bar. Tested, therefore, by the rule of the common law, it is plain

that Thomas B. Hopper would not be entitled to the disputed premises. But in this state, as in many others, that rule has been changed by statute. Section 22 of the act of April 10, 1850, as amended in 1866, (St. 1865-66, p. 381,) provides:

"Any estate, right, or interest in lands acquired by the testator after the making of his will shall pass thereby and in like manner as if (possessed) at the time of making the will, if such shall manifestly appear by the will to have been the intention of the testator. Every will made, in express terms devising, or in any other terms denoting the intent of the testator to devise, all the real estate of such testator, shall be construed to pass all such real estate which such testator was entitled to devise at the time of the decease of such testator."

If, therefore, from a fair reading of the will in question, it appears that it was the intent of the testator thereby to devise all of the property of which he should die seized, it is within the operation of the statute to give effect to that intention. 1 Redf. Wills, 333, 338, (4th Ed.); *Brimmer v. Sohler*, 1 Cush. 132; *Winchester v. Forster*, 3 Cush. 369; *Liggatt v. Hart*, 23 Mo. 127; *Quinn v. Hardenbrook*, 54 N. Y. 87. "Every testator is aware," as said in *Brimmer v. Sohler*, *supra*, "that his will cannot take effect until after his death; that until that event all his property remains at his disposal; and, ordinarily, it is from that period that his intention to settle its final distribution may be presumed." But the language of the will we are considering makes manifest the intent of the testator to dispose thereby of all of the property he might own at his death. By it he first directs payment of all his legal debts, after which he devises and bequeaths to his wife all the real estate, money, and other property "*which may remain after satisfying the following provisions*, for her sole use and benefit during the term of her natural life, to be disposed of at her death as hereinafter mentioned." The provisions to be satisfied, according to the terms of the will, before the devise and bequest to the wife becomes effective, are certain specific devises, among which is the one to Thomas B. Hopper. After these specific devises are satisfied and the debts paid, all of the remaining property is to go to the widow during her natural life, and afterwards as further directed by the testator.

We think the language of the will clearly denotes the intention of the testator to dispose of all of the property he should leave at the time of his death, and as he owned the property in question at that time, and as by the terms of the will it is devised to Thomas B. Hopper, he is entitled to have it awarded to him in and by the decree of distribution.

Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.

We concur: MCKINSTRY, J.; MCKEE, J.

(66 Cal. 78)

WHITTIER v. DIETZ. (No. 7,102.)

Filed November 6, 1884.

TRADE-MARKS—EXCLUSIVE USE—RECORDING.

Since the Codes went into operation no one can acquire the exclusive use of a name or trade-mark in this state except by filing it for record with the secretary of state.

Department 1. Appeal from the superior court of the city and county of San Francisco.

This was a suit for an injunction to restrain the defendant from infringing plaintiff's alleged trade-mark, and for damages. The court, on demurrer, held that the facts in plaintiff's complaint did not constitute a cause of action. Plaintiff appealed.

Wheaton & Scrivener, for appellant.

John L. Boone, for respondent.

MCKINSTRY, J. No points have been filed on the part of respondent. We think the device alleged to have been used by defendant is not such a colorable imitation of the plaintiff's label as could deceive. *Falkinburg v. Lucy*, 35 Cal. 52. No one, since the Codes went into operation, can acquire the exclusive use of a name or trade-mark in this state, except by filing it for record with the secretary of state. Pol. Code, § 3197. Section 3199 only provides that one may become the owner of a name or trade-mark who has first adopted, recorded, and used it, whether first used within or beyond the limits of the state. Only by making the clause "within or beyond the limits of the state" relate to the use of the name or trade-mark can effect be given to the word "recorded" in the same section. What is a legal record of a trade-mark in another state? It is manifest the record referred to is the record in the office of the secretary of state.

Derringer v. Plate, 29 Cal. 292, was decided before the Codes, and turned in part upon the point that the act of 1863 provided that the counterfeiting of a trade-mark should be a *misdeemeanor*, punishable as such, and thus only creating a new penalty for a violation of the trade-mark provided for in the statute; and, principally, upon the fact that the act of 1863 contained sections which clearly indicated the legislature did not intend to divest of existing rights in trade-marks those who had acquired the right at common law before the taking effect of the act. Here the complaint shows that plaintiff's asserted right is claimed to have been acquired subsequent to the adoption of the Codes, and neither the Political nor Civil Code imposes any special or additional penalty upon violators of such rights, nor furnishes any remedy for their enforcement unknown to the common law. Judgment affirmed.

We concur: MCKEE, J.; ROSS, J.

(66 Cal. 79)

HARRIS and others v. HILLEGASS, Adm'x, and others. (No. 8,261.)

Filed November 6, 1884.

EQUITABLE RELIEF—EFFECT OF LACHES—PLEADING.

Laches deprives a plaintiff of the right to appeal to a court of equity, and the court may refuse to entertain a suit brought after unreasonable delay, although defendant has not in his answer alleged that the claim is stale.

Department 1. Appeal from the superior court of the city and county of San Francisco.

Edw. J. Pringle, for appellant.

S. V. Smith & Son, for respondent.

McKINSTRY, J. There was evidence to sustain the finding that the partnership created by the contract of June 26, 1849, was dissolved more than 20 years before the commencement of this action. As the dissolution occurred more than 20 years before the commencement of the action, the court below—a court of equity—was justified in refusing to entertain plaintiff's application for relief. And, as *laches* deprives a plaintiff of the right to appeal to a court of equity, the court may refuse to entertain a suit, brought after unreasonable delay, although the defendant has not, in his answer, alleged that the claim is stale. *Sullivan v. Portland*, 94 U. S. 811. Judgment and order affirmed.

We concur: McKEE, J.; ROSS, J.

(66 Cal. 96)

RATHGEB v. TISCORNIA. (No. 8,502.)

Filed November 7, 1884.

1. CHANGE OF VENUE — RESIDENCE OF DEFENDANTS — DISQUALIFICATION OF JUDGES.

Where, in an action required to be tried in a county where some of the defendants reside, all the defendants appeared, and asked that the cause be transferred to a certain county where some of them resided, such was one of the proper counties to try it in, and the order to have it tried there was correct, notwithstanding the disqualification of the judge of that county to try the case.

2. SAME—AFFIDAVIT OF MERITS, SUFFICIENCY OF.

There is no essential difference between an affidavit of merits stating that the defendant "has fully and fairly stated the case in this action," and one which states that he "has fully and fairly stated the facts of the said case."

Department 2. Appeal from the superior court of the city and county of San Francisco.

C. V. Grey, for appellant.

Reddick & Solinsky and *A. C. Adams*, for respondent.

Cal. Rep. 1-4 P.—59

SHARPSTEIN, J. This action was commenced in San Francisco against 16 defendants. Fourteen of them reside in Calaveras county, one in Santa Clara, and one, on whom the summons has not been served, and who has not appeared in the action, is in Italy. The 15 on whom service was had appeared, and demanded that the place of trial be changed to Calaveras county, where 14 of them resided. The motion was granted, and this appeal is from that order. If all the defendants who united in the demand had resided in Calaveras county, their right to have the action tried there would be perfectly clear.

This is one of the actions which the Code says must be tried in the county in which the defendants, *or some of them, reside*; but which may be tried in the county in which it is commenced, unless the defendant demands that the trial be had in the proper county; *i. e.*, in the county in which the defendants, or some of them, resided at the commencement of the action. Calaveras county is the county in which most of the defendants resided at the commencement of the action, and therefore was one of the proper counties for the trial; and, as all the defendants who were served, or who have appeared in the action, united in a demand to have the trial in that county, we think the order to have it tried there was correct. The disqualification of the judge of Calaveras county to try the case in no way affects the right of the defendants to have it transferred to that county for trial. If the judge of that county is disqualified, the Code plainly points out the course to be pursued. There is no essential difference between an affidavit of merits, which states that the defendant "has fully and fairly stated the case in this action," and one which states that he "has fully and fairly stated the facts of the said case." Order affirmed.

We concur: THORNTON, J.; MYRICK, J.

66 Cal. 92

PEREIRA v. CENTRAL PAC. R. Co. (No. 8,495.)

Filed November 7, 1884.

FREIGHT CONTRACT—CONSTRUCTION—QUESTION FOR JURY.

In an action against a carrier for failure to properly deliver goods, it is a question for the jury to determine whether the shipments which are the subject of the action were made in pursuance of a contract agreed on between the parties before the shipment was actually made, or whether the terms and conditions stated in the receipts given by the carrier when the goods were put in his charge constituted the contract between the parties.

Department 1. Appeal from the superior court of San Joaquin county.

W. L. Dudley, for appellant.

Caleb Dorsey and D. S. Terry, for respondent.

Ross, J. The main question in this case is whether the defendant, whose road ends at Ogden, in the territory of Utah, contracted with the plaintiff to carry his fruit beyond its own terminus over other roads to the city of New York. That question was submitted to a jury in the court below, and the finding in effect was that defendant did so contract. It appeared in evidence that the plaintiff, being desirous of sending to the New York market a lot of pears, applied to the general freight agent of the defendant corporation to know what defendant would charge him per car-load, to be sent by passenger train; plaintiff at the time informing the agent that it was necessary that the fruit should be transported to its destination within 10 or 12 days. The agent replied that he did not then know what it would cost, but thought about \$1,500 per car-load; and, further, that he could not send it through to New York by passenger train, but could send it by passenger train as far as Omaha, and from there to New York by fast freight train, and that thus sent it would reach New York within the time mentioned. The agent promised to let plaintiff know within a few days as to the terms upon which defendant would take the fruit, and accordingly wrote and sent to the plaintiff this letter:

"CENTRAL PACIFIC RAILROAD COMPANY.

"GENERAL FREIGHT OFFICE,

"SACRAMENTO, CAL., Nov. 14, 1871.

"*John Pereira, Esq., Jamestown, Tuolumne Co., Cal.*—DEAR SIR: I am in receipt of your favor of November 10th, and have this day telegraphed you as follows: Fruit, Stockton to New York, to Omaha by passenger train, thence by freight, ten hundred and seventy-five, (\$1,075,) C. Y., per car. Freight must be prepaid or else guarantied by responsible parties. The current rates on wine, Stockton to New York, are as follows: Wine in wood, owner's risk of leakage, car-loads of 18,000 lbs. and over, \$2.50 per 100 lbs.; less than 18,000 lbs., and over 3,000, \$3.50 per 100 lbs.; 3,000 lbs. and under, \$4.50 per 100 lbs. It is not probable that there will be any material change in these rates before next spring.

"Yours, truly,

C. W. SMITH, G. F. A."

Plaintiff accepted the terms thus proposed, and accordingly delivered to the defendant, on the twenty-third of November, 1871, one car-load, consisting of 536 boxes of pears, consigned to L. Benedict, New York city, and at the same time executed to defendant the guaranty it required that the freight money, \$1,075, would be paid to defendant on the delivery of the fruit in New York. Such delay occurred in the transportation of this lot of fruit to its destination that the result was it was damaged to such an extent as rendered it almost worthless, and the consignee therefore refused to receive it. The next lot, consisting of 235 boxes of pears, was delivered to defendant upon the same terms, and with a similar guaranty, on the eighth day of December, 1871, and was never transported to New York at all, and resulted in a total loss to the plaintiff.

The evidence put before the jury in this case in support of the special contract relied on by the plaintiff is quite as strong, if not stronger, than the evidence given in *Railroad Co. v. Pratt*, 22 Wall. 131, to establish a similar contract; and in that case the supreme court of the United States held the evidence sufficient to sustain the verdict of the jury, to the effect that the undertaking of the company was to carry the property through to the point of final destination. In the case at bar, it was understood by both parties that it was necessary that the fruit should be carried through to New York within 12 days, at the furthest, and that to accomplish this it was necessary that it should be sent a portion of the way, at least, by passenger train. Defendant accordingly expressly agreed to carry it by passenger train as far as Omaha, a point beyond the terminus of its own road, and thence by fast freight train to New York, demanding at the same time, as it had the right to do, a guaranty from the plaintiff that the freight money should be paid to *defendant* upon the delivery of the fruit in the city of New York.

When the first lot of fruit was delivered by plaintiff's teamster to the local agent of the defendant, the latter gave the teamster a receipt for the same, which was partly in print and partly in writing, acknowledging the receipt in apparent good order of the property, marked and consigned to L. Benedict, New York, and which receipt recites that—

"They [the railroad company] agree to deliver with as reasonable dispatch as their general business will permit, subject to the conditions mentioned below, in like good order, (the danger incident to railroad transportation, loss or damage of combustible articles by fire while in transit, and unavoidable accidents excepted,) at ——— station, upon the payment of charges. The company further agree to forward the property to the place of destination as per margin, but are not to be held liable on account thereof after the same shall be delivered as above. The company, however, guaranty the through rate of freight as designated below. Conditions: The company do not agree to carry the property by any particular train, nor in time for any particular market. * * * It is a part of this agreement that all other carriers transporting the property herein receipted for, as a part of the through line, shall be entitled to the benefit of all the exemptions and conditions above mentioned."

It seems that a similar receipt was given by the local agent of defendant to plaintiff's teamster for the second lot of fruit.

It is contended on behalf of defendant, and was so set up in its answer filed in the cause, that the terms and conditions stated in the receipt constituted the contract between the parties to this action for the transportation of the fruit in question. Whether or not this was so, was a question for the jury to determine in view of all the evidence. The simple delivery of a receipt to the shipper is not conclusive upon the latter. *Tyler v. W. U. Tel. Co.* 60 Ill. 431; *Michigan Cent. R. Co. v. Hale*, 6 Mich. 244; *Adams Exp. Co. v. Haynes*, 42 Ill. 89; *Illinois Cent. R. Co. v. Frankenberg*, 54 Ill. 88. The court below properly left it to the jury to say whether the shipments in

question were made under the contract declared on by the plaintiff, or whether the terms and conditions stated in the receipts constituted the contract between the parties. The jury having found from evidence, which we think sufficient to support the verdict, that defendant undertook to carry the fruit through to New York, the other companies are to be deemed the agents of the defendant, for whose fault it is responsible. *Railroad Co. v. Pratt, supra.*

Some minor points are made for the defendant, which we have considered, but see in them no sufficient ground for disturbing the judgment.

Judgment and order affirmed.

We concur: MCKINSTRY, J.; MCKEE, J.

SUPREME COURT OF CALIFORNIA.

66 Cal. 87

CLARK v. CHILDS. (No. 8,435.)

Filed November 7, 1884.

1. ANSWER—NEW MATTER—WRITTEN INSTRUMENT—GENUINENESS ADMITTED.

Every avérment of new matter in an answer is taken to be denied, except that the genuineness and due execution of a written instrument recited in the answer is taken as admitted, unless plaintiff shall expressly deny the same under oath; but where such a writing set forth in the answer is not denied by affidavit, if evidence in respect to that matter, and tending to show that the instrument is not genuine, or was not delivered, is introduced without objection or motion to strike, and is met by counter-evidence, defendant will not be permitted to claim that the genuineness and due execution of the instrument are admitted.

2. WRITTEN INSTRUMENT—EXECUTION—DELIVERY.

The execution of a written instrument includes its delivery.

3. INSTRUCTIONS—REVERSAL.

The giving or refusal to give instructions, when a party is not injured or prejudiced thereby, cannot constitute a ground for reversal of the judgment.

Department 1. Appeal from the superior court of the city and county of San Francisco.

Latimer & Morrow, for appellant.

J. M. Nougues, for respondent.

MCKINSTRY, J. The action is to recover the proceeds of a sale by defendant of certain stocks, the property of plaintiff. The original answer set out a release, under seal, (of date July 18, 1874,) whereby plaintiff, in consideration of one dollar, as recited, remised, released, and forever discharged the appellant, defendant, of and from all demands, etc. The amended answer avers certain payments on account of the indebtedness of defendant, aggregating \$1,050; and further alleges that on the first day of July, 1874, defendant paid to plaintiff, and plaintiff accepted and received from defendant, \$250, in full satisfaction and discharge of the damages, liability, debt, and cause of action set out in the complaint. The plaintiff failed to file with the clerk, within 10 days after service of the original answer, the affidavit provided for in section 448 of the Code of Civil Procedure. The genuineness and due execution of the lease pleaded were, therefore, admitted, and the "execution" of a written instrument, within the meaning of the section of the Code, includes its delivery. But defendant here did not ask for nonsuit, or for judgment on the pleadings, but called the plaintiff as a witness, and proceeded to examine him with reference to the release set forth in the answer. The testimony of the witness was to the effect that the release recited in the original answer was not, in fact, delivered to the defendant, but was given to the president of the San Francisco Stock & Exchange Board under the circumstances following:

The board had adopted certain rules, numbered 44 and 45, which read:

"ARTICLE 44.—ARBITRATION CLAIMS OF NON-MEMBERS.

"Any person not a member of the board shall have the right to bring a claim against a member of said board arising from any transaction in stocks or money loaned during his membership, on the condition following, and not otherwise. The person making such claim shall execute a full release of his claim against said member, duly signed, and shall deliver the same to the president, to be held in trust to abide the event of the suit before said board. The president shall keep the said release in trust, to abide result of said suit, and shall deliver the same to the defendant on the happening of either of the three following events: *First*, in case the claimant shall not present his claim to the board within twenty days after executing said release; *second*, in case judgment shall be rendered for said defendant by the board; *third*, in case the defendant shall pay or offer to pay to such claimant the amount of judgment rendered in favor of said claimant.

"In case judgment shall be rendered against any member of the board, which he is unable or unwilling to pay, then such release shall be canceled and returned to such claimant.

"FORM OF RELEASE.

"Know all men by these presents, that I, ———, for and in consideration of the sum of one dollar, to me in hand paid by ———, the receipt of which is hereby acknowledged, have remised, released, and forever discharged, and by these presents I do hereby remise, release, and forever discharge, the said ——— of and from any and all demands heretofore existing, and due and owing to me, and the said ——— is hereby fully released and discharged from the same.

"Sealed with my seal, and dated San Francisco, this ——— day ———, 18—.

"ARTICLE 45.—REGARDING SUSPENSION OF MEMBERS AND LEGAL PROCEEDINGS.

"In all cases where and in accordance with the provisions of article 44 of the by-laws a judgment has been or shall be rendered against any member of the board by the board, such member shall, without further action of the board, stand suspended from the time of the rendition of such judgment until the same is fully paid or satisfied, or tendered and refused. Whenever any creditor of a member of this board, or any person asserting a claim against a member of this board, has voluntarily, or shall voluntarily, resort to any legal tribunal, or has voluntarily instituted or shall voluntarily institute any legal proceedings against such member concerning his claim, such claim shall not be recognized or enforced by this board."

Sometime after the commencement of this action plaintiff brought his claim to the San Francisco Stock & Exchange Board against the defendant, who was a member of the board, and signed, sealed, and delivered to the president the release set forth in the original answer, in trust, as by article 44. The plaintiff, a day or two after executing such release, in consideration of \$250 paid him by defendant, withdrew his claim from and dismissed his proceeding in the stock and exchange board, and executed and delivered to defendant at the same time a second release, in form like the first.

When the proceeding in the board was abandoned by plaintiff, at the request of defendant, which was before any one of the contingen-

cies contemplated by the rule as a circumstance to precede the delivery of the release to defendant happened, that release ceased to have any office to perform. It was not, therefore, delivered.

In the amended answer defendant pleaded in effect an accord and satisfaction. But the evidence was that the \$250 was not received in satisfaction of the indebtedness, but solely in return for a dismissal of the proceeding before the stock board. The verdict of the jury included a finding that the release pleaded was not delivered, and a finding that the averment in the amended answer that plaintiff received \$250 in full satisfaction of the discharge of defendant's debt was not sustained. In view of the evidence we are not authorized to set aside the verdict. The charges to the jury objected to by appellant, which were to the effect that the burden of proof was on defendant to prove the execution of the release set out in the answer, but that the execution (including delivery) *was proved* by reason of the failure of defendant to deny the same by affidavit, were, in view of the evidence introduced by defendant tending to prove that the release was not delivered, more favorable to appellant than he was entitled to ask. The court, after giving to the jury the substance of the rules of the stock board above recited, said: "In this case the defendant has not introduced any evidence at all to show that either of these contingencies has happened," etc. This was a statement of a fact; the defendant had not introduced such evidence. But if the language be construed to be an intimation that the *onus* was on defendant to prove the occurrence of one of the events mentioned in the rule, it could not have injured the defendant, since, as we have seen, the undisputed testimony on his part showed that the parties had contracted that the release should not be delivered. For the same reason the court did not err in charging: "The mere circumstance that the defendants here produce this release, in and of itself alone, *in view of the other evidence offered in this case*, would not entitle him to a verdict." And, because the defendant himself went behind the release and proved the real nature of the transactions between the parties, the eleventh and twelfth instructions given by the court to the jury could not have prejudiced the appellant. And the court below was justified in refusing the instruction requested: "Since the due execution and genuineness of the release have not been so denied, [by affidavit] it constitutes a bar to the action, and the jury will therefore find for the defendant." If, as shown by the testimony of defendant's witness, it was agreed between plaintiff and defendant, for a valuable consideration, that the release should not be delivered, but should go for naught, the attempt to assert it as a bar and discharge of plaintiff's demand was a fraud upon plaintiff, and as there was no conflict in the evidence that such contract was in fact entered into, the release was not a bar. The defendant having himself introduced the evidence showing that the release was not in fact delivered, was estopped from claiming the benefit of the admission

arising out of plaintiff's failure to deny by affidavit "the genuineness and due execution" of the instrument.

Every averment of new matter in an answer is taken to be denied, except that if the answer recite a written instrument, the genuineness and due execution of the instrument are not to be taken as denied, but on the contrary as admitted, unless the plaintiff shall expressly deny the same under oath. It has been repeatedly held here that where an averment of the complaint is not denied by the answer, still, if an action is tried upon the assumption that the averment is denied, and evidence *pro et con* introduced with reference to the supposed issue, a court is justified in holding, upon a preponderance of the evidence, that the averment is not true. By parity of reason, where the written instrument set forth in the answer is not denied by affidavit, yet, if evidence in respect to that matter, and tending to show that the instrument is not genuine, or was not delivered, is introduced by plaintiff without objection on the part of defendant, or motion to strike out, and is met by counter-evidence on the part of defendant, the latter ought not to be permitted to claim that the genuineness and due execution of the instrument is admitted. *A fortiori*, where such evidence is first introduced by the defendant. Judgment and ordered affirmed.

We concur: Ross, J.; McKee, J.

68 Cal. 99

PEOPLE v. SAMUELS. (No. 11,000.)

Filed November 14, 1884.

1. CRIMINAL LAW AND PROCEDURE—DISQUALIFICATION OF JUROR—NEW TRIAL.

When the objection is taken for the first time after the trial that certain of the jurors were not qualified, because their names were not on the assessment roll, the objection is too late and not ground of a new trial.

2. SAME—INSTRUCTION—HOMICIDE, WHEN JUSTIFIABLE.

An instruction that the "bare fear of an assault upon the defendant will not justify homicide, nor the fear that deceased was about to commit a felony, unless defendant believed that there was imminent danger thereof," is more favorable to a defendant than he is entitled to, and not error.

3. SAME—CHARGE OF THE COURT OF ITS OWN MOTION.

The charge of the court of its own motion is not required by the statute to be marked by the judge; it is sufficient if it appear that the charge was given, which does appear in this case.

4. CERTAIN INSTRUCTIONS TO THE JURY *held* valid and proper.

Department 2. In the superior court of the county of Santa Barbara.

McNulta & Oglesby, for appellant.

The Attorney General, for respondent.

MYRICK. J. The defendant was informed against for the crime of murder, and was convicted of murder in the second degree.

1. Two persons being examined as to qualifications to serve as jurors, answered that they were assessed upon the last assessment roll of the county. After the verdict, the defendant caused the index of the assessment roll to be examined, and, not finding the name of either of the persons, moved for a new trial, and in arrest of judgment. *People v. Fair*, 43 Cal. 137, is directly in point, adverse to the appellant.

2. The court instructed the jury, at the request of the prosecution, that the "bare fear of an assault upon the defendant will not justify homicide, nor the fear that deceased was about to commit a felony, unless defendant believed there was imminent danger thereof." This instruction was more favorable to the defendant than he was entitled to, as it omitted the element of the reasonableness of the belief.

3. The statute does not require that the charge of the court, given of its own motion, should be marked by the judge; it is sufficient if it appear that the charge was given, which does appear in this case.

4. The court instructed the jury: "The distinction between murder and manslaughter lies in the presence or absence of malice. The existence of malice, like any other fact, may be logically inferred by the jury from all the facts and circumstances of the case legally proved, the weapon used, the action of the defendant at the time of the occurrence, and his previous acts and conduct." We fail to see any error in this instruction. The same may be said as to the instruction regarding character, viz.: "If you should believe the defendant guilty, you must so find, notwithstanding his good character."

We see no error. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

66 Cal. 97

EHRLICH v. EWALD. (No. 7,680.)

Filed November 13, 1884.

MORTGAGE—PLEDGE—LIEN—ACTION FOR DEBT.

Section 726 of the Code of Civil Procedure, which requires that where personal property is given as a security for money loaned, the lien against the property must be first enforced before a direct action can be maintained for the money loaned, refers in terms to a mortgage as distinct and separate from a pledge. A pledgee is not prevented from having his action to recover the money until he has first exhausted the subject of the pledge.

Department 2. Appeal from the superior court of the city and county of San Francisco.

G. F. & W. H. Sharp, for appellant.

B. S. Brooks, for respondent.

BY THE COURT. The court below found that defendant was indebted to plaintiff for money loaned, to secure the payment whereof defendant had delivered to plaintiff certain personal property, which property is still held by plaintiff, who had taken no steps to subject the same to sale for the payment of the debt. The action had been brought to recover judgment for the amount due, with interest. The defendant insists that, according to section 726 of the Code of Civil Procedure, the action cannot be maintained; that the plaintiff must first seek to enforce his lien before he can have an independent action for money. This view was taken by the court below in refusing judgment for plaintiff on the findings, and in rendering judgment for defendant.

Section 726 of the Code of Civil Procedure refers, in terms, to a mortgage. Distinction between a mortgage and a pledge is clearly recognized in sections 2920 and 2928 of the Civil Code. In case of a pledge, the pledgee may resort to a judicial sale, (section 3011, Civil Code,) or he may sell on notice (sections 3000-3005, Civil Code) without suit, the latter remedy not being given in case of a mortgage. We find nothing which will prevent a pledgee from having his action to recover the debt without first exhausting the subject of the pledge. *Sonoma Bank v. Hill*, 59 Cal. 107.

The order of the court below on a former hearing, granting a new trial, affirmed in 51 Cal. 172, is not the law of the case. The court below may have granted the new trial for the reason above stated, among others, but this court, in its opinion, stated the ground on which the order was affirmed, which was not the point here presented. The plaintiff was entitled to judgment for the amount stated in the findings, with interest. The judgment is reversed, and the cause is remanded, with instructions to render judgment in accordance herewith.

PEOPLE v. RIGHETTI. (No. 20,005.)

Filed November 12, 1884.

1. PRACTICE—INSTRUCTIONS—REFUSAL WHERE SUBSTANTIALLY GIVEN.

It is not error to refuse to give instructions, the subject-matter of which has been covered in the instructions already given.

2. SAME—INSTRUCTIONS AFTER JURY RETURN.

It is not error for the court to instruct the jury after they had retired for deliberation on the case, and had come into court, they not having requested the court to be instructed.

Department 2. Appeal from the superior court of San Bernardino county.

After the jury had retired for deliberation on the case, and had come into court, the court instructed the jury further, without their having requested to be instructed.

J. M. Wilcoxson, for appellant.

The Attorney General, for respondent.

By THE COURT. Information for burglary; conviction, first degree.

1. The instructions asked and refused were properly refused, as the instructions given covered each phase of the instructions asked to be given.

2. No error appears in the transactions occurring when the jury were brought into court.

Judgment and order affirmed.

2 Cal. Unrep. 399

CARTER v. ALLEN. (No. 8,377.)

Filed November 14, 1884.

1. NEW TRIAL.—STATEMENT OF THE CASE—ERROR NOT SPECIFIED.

Where a motion for a new trial was made on a statement of the case, no alleged error of law can be considered unless it is specified in the statement.

2. EVIDENCE—FINDINGS.

Evidence held to sustain the findings.

Department 2. Appeal from the superior court of the city and county of San Francisco.

Tully R. Wise, for appellant.

Stanley, Stoney & Hayes, for respondents.

By THE COURT. The motion for a new trial was made on a statement of the case, and we cannot consider any alleged error of law unless it is specified in the statement; and the ruling of the court on the defendants' offer "to show that the money in the hands of the administrator had come to his hands during the existence of the first bond" is not specified as one of the particular errors upon which the defendants would rely. If the finding that the administrator received, after the bond on which the action is based was executed, a sufficient sum of money to satisfy the plaintiff's demand, was justified by the evidence, the question whether the sureties would be liable if their principal had not had, at any time after the date of the bond, any money in his hands belonging to the estate, does not rise in this case. The evidence, as we read it, justifies that finding. We think the rulings of the court on the objections to the introduction of the orders of the probate court and the judgment roll admitted in evidence were correct.

Judgment and order affirmed.

66 Cal. 98
2 Cal. Unrep. 400

SHARP v. MILLER. (No. 7,612.)

Filed November 14, 1884.

APPEAL—ORDER MADE AFTER REVERSAL OF JUDGMENT.

The reversal of a judgment and order denying a motion for a new trial, on appeal, places the parties in the lower court in the same position as if the cause had never been tried, (except that the opinion of the appellate court must be followed as far as applicable in the new trial;) there is no existing judgment, and an order made after such reversal is not an order made after final judgment, nor appealable as such.

Department 2. Appeal from the superior court of the city and county of San Francisco.

P. B. Ladd, for appellant.

G. F. & W. H. Sharp, for respondent.

BY THE COURT. The order appealed from in this case is not appealable. The appellant contends that it is a special order made after final judgment. The judgment formerly rendered was reversed, and there was no judgment in the cause when the order appealed from was made. The reversal of the judgment and order denying the motion for a new trial when the cause was here before (see 54 Cal. 329) placed the parties in the lower court in the same position as if the case had never been tried, with the exception that the opinion of this court must be followed so far as applicable in the new trial. *Stearns v. Aguirre*, 7 Cal. 447.

Appeal dismissed.

DORLAND v. BERNAL. (No. 7,204.)

Filed November 13, 1884.

JUDGMENT AFFIRMED.

No merit appearing in any of the points presented by appellant, judgment affirmed.

Department 2. Appeal from the superior court of the city and county of San Francisco.

M. G. Cobb, for appellant.

Chas. H. Parker, for respondent.

BY THE COURT. This is a street assessment case. Seven reasons are presented by the appellant why the judgment should be reversed. Several of them have been passed upon adversely to the appellants. We see no merit in those not so passed upon. Judgment and order affirmed.

PEOPLE v. OILER. (No. 20,004.)

Filed November 14, 1884.

CONSTITUTIONAL LAW — DEPOSITION TAKEN BEFORE COMMITTING MAGISTRATE, ADMISSIBILITY OF.

The deposition of a witness, taken before a committing magistrate, is admissible in evidence on the trial of a defendant for having in his possession dies and plates used for counterfeiting current coins, where it is proven that such witness is absent from the state. Section 13, art. 1, of the constitution of 1879, and the Penal Code, §§ 686, 689, wherein such evidence is authorized, are not conflicting.

Department 2. Appeal from the superior court of San Luis Obispo county.

J. M. Wilcoxson, for appellant.

The Attorney General, for respondent.

THORNTON, J. The defendant was accused by information of the offense of feloniously, willfully, and knowingly having in his possession dies, plates, etc., designed for and made use of in counterfeiting silver coins current in this state, and was found guilty as charged. On the trial, the prosecution offered in evidence the disposition of one Antonio Chavez, taken by the committing magistrate on the preliminary examination before him of defendant, having first shown the absence of said Chavez from the state. The deposition was taken through an interpreter, and before offering it the interpreter was called, who testified that he correctly translated to the short-hand reporter and the court, on the examination referred to, the testimony of Chavez, and that the deposition shown him written out in long-hand was the testimony of Chavez given on such examination. The reporter and the magistrate who officiated at such examination were also called, who identified the deposition and testified to its correctness. With this preliminary evidence the prosecution offered to read the deposition to the jury. The defendant objected to its being read on the ground that it was irrelevant, immaterial, incompetent, and hearsay. The court overruled the objection, and defendant reserved an exception.

We are of opinion that the court in this ruling committed no error. The deposition was taken in accordance with the provisions of law in regard to the preliminary examinations before a magistrate. See Penal Code, § 869. The defendant was present at the examination and had an opportunity of cross-examining, and did participate in cross-examining, Chavez. It was proven before the deposition was offered that Chavez was absent from the state. Under these circumstances, the deposition was, by the express terms of section 686 of the Penal Code, admissible in evidence.

It is contended on behalf of defendant that sections 686 and 689, above cited, so far as they allow the deposition taken on the prelim-

inary examination of a person charged with a public offense to be read in evidence on the trial of such person, are unconstitutional; and, to sustain this point, reference is made to the last clause of section 13, art. 1, of the constitution of 1879. We are of opinion that this contention is untenable. The clause of the constitution referred to was intended to confer further power on the legislature in regard to the taking of evidence by deposition in criminal cases. This clause invests the legislature, under the circumstances mentioned in it, with power to authorize the taking of depositions in criminal cases, other than those of homicide, of witnesses not called on the preliminary examination. It was not intended to take away a power long exercised by legislatures in regard to the depositions of witnesses taken on such preliminary examinations. Such a power as the latter was exercised by parliament in England in the sixteenth century, (see Statutes 1 & 2 Phil. & Mary, c. 13, §§ 4, 5, and 2 & 3 Phil. & Mary, c. 10,) and from an early period in various states of the Union, and it has been held to be properly exercised in the states whose constitutions secured to an accused person the right to be confronted face to face with the witnesses against him. *People v. Res-tell*, 3 Hill, 289; *State v. Johnson*, 12 Nev. 121; *Com. v. Richards*, 18 Pick. 434; *Summons v. State*, 5 Ohio St. 325; Bishop, Crim. Proc. §§ 1194-1196, etc., to close of chapter 79, and cases cited in notes. We find no error in the record, and the judgment and order are affirmed.

We concur: SHARPSTEIN, J.; MCKINSTRY, J.

2 Cal. Unrep. 402

DORE v. DOUGHERTY. (No. 9,683.)

Filed November 19, 1884.

APPEAL—FOR WHAT DISMISSIBLE.

An appeal is dismissible for some irregularities in taking it, for failure to prosecute, for want of appearance, or on consent of parties; but where it has been perfected according to law and the appellant appears, he is entitled to be heard upon any question of fact involved in the merits. Because the proposed statement on motion for a new trial was not served upon a certain one of the adverse parties is not ground for dismissal of the appeal.

Department 1. Appeal from the superior court of the city and county of San Francisco.

J. M. & C. E. Nougues, for appellant.

Mich. Mullany and Firebaugh & Bates, for respondent.

MCKEE, J. The respondent moves to dismiss the appeal taken from the order denying a motion for a new trial in this case, principally upon the ground that the transcript shows on its face that

the proposed statement on the motion was not served upon one of the "adverse parties," as required by subdivision 3, § 659, Code Civ. Proc.

It is conceded that the proposed statement was served on all the parties except one, viz., the defendant Hallidie. Upon him it was not served; but the court, as to the parties upon whom it was served, settled and allowed the same, certified to its correctness, and upon it, as certified, the motion for a new trial was submitted and denied. It may be that the court denied the motion because the proposed statement had not been served upon *all* the parties. If that were so, or if it were not so, it is not cause for a dismissal of the appeal. An appeal is dismissible for some irregularities in taking it, or for failure to prosecute it, or for want of appearance, or for consent of parties; but where it has been perfected according to law, and the appellant appears, he is entitled to be heard upon any question or fact involved in the merits.

Motion denied.

We concur: ROSS, J.; MCKINSTRY, J.

SUPREME COURT OF CALIFORNIA.

66 Cal. 112

EVANS v. BAILEY. (No. 8,481.)

Filed November 20, 1884.

1. EVIDENCE—BOOKS OF CORPORATION—ARTICLES OF INCORPORATION.

The books of a corporation are competent evidence to prove the number of shares issued, and who were the shareholders at the time an alleged indebtedness arose. But articles of incorporation dated a year or more previous to that time do not necessarily show those facts, and it is not error to rule them out for that purpose.

2. FINDINGS—EVIDENCE.

Findings held not sustained by the evidence.

Department 2. Appeal from the superior court of the city and county of San Francisco.

Estee & Boalt and *R. E. Wilson*, for appellant.

A. B. Hart, *G. A. Heinlen*, and *W. Saunders*, for respondent.

BY THE COURT. 1. The cause of action, as stated in the complaint, is for goods sold and delivered to the defendant, the California Fruit & Meat Shipping Company, viz., cattle to the amount of \$5,253.60, with a credit of \$750, and that said defendant undertook and promised to pay said sum, with interest. The plaintiff was the only witness sworn on his behalf. From his testimony it appears that 133 head of the cattle were delivered to said company to be by it slaughtered and the meat sold on commission. The proof does not correspond with the allegation; the evidence does not sustain the finding in that regard.

2. The question of *ultra vires*, raised by the People's Ice Company, is not tenable. It does not appear that it was not within the scope of the powers of the People's Ice Company to acquire or hold stock of the California Fruit & Meat Shipping Company, under any circumstances or for any purpose; and it does not appear under what circumstances the stock was acquired or held. *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 578.

3. The books of the company were competent evidence to prove the number of shares which had been subscribed for and issued at the time the alleged indebtedness arose, and who were the shareholders.

4. The articles of incorporation, dated in 1877, would not necessarily show who were the shareholders, or in what amounts, respectively, during the time from December, 1878, to February, 1879; therefore, no error is manifest in ruling out the articles.

For the error above noted, the judgment and order are reversed, and the cause is remanded for a new trial.

66 Cal. 113

PARKER v. BERNAL. (No. 8,444.)

Filed November 20, 1884.

STREET ASSESSMENT—OWNER OF PROPERTY—PARTIES.

In a street-assessment suit it is competent that the action should be brought against the executrixes of an estate of which the property was a part, although the heirs of the deceased person be in fact the owners, and there would be no error in dismissing as to the heirs, and rendering judgment as to the executrixes.

Department 2. Appeal from the superior court of the city and county of San Francisco.

Moses G. Cobb, for appellant.

Chas. H. Parker, for respondent.

BY THE COURT. Street-assessment suit. The action was brought against several persons, heirs of one Jose Jesus Bernal, deceased, and two persons, executrixes of the will of deceased. The executrixes alone answered. After trial, the court found that at the time of the assessment the said defendants were the owners of the premises on which the lien is claimed to exist. Some two years after, in rendering judgment, the action was dismissed as to all the defendants except the executrixes, and thereupon judgment was rendered for plaintiff. We see no error in this affecting any substantial right of the defendants. According to section 17 of the act of April 1, 1872, (St. 1871-72, p. 818,) the person owning the fee, or in the possession of the premises, or exercising acts of ownership for himself, or as administrator or guardian, or the person in whom the legal title appears by recorded deeds to be, shall be deemed the owner for the purposes of the act. It was therefore competent that the action should have been brought against the executrixes, (equivalent for this purpose to administrator,) even though the heirs of a deceased person be, in fact, the owners. That being the case, there was no error in dismissing as to the heirs, and rendering judgment as to the executrixes.

We cannot say that the description given *does not* give the boundaries of any land. The other questions presented have been passed upon by this court.

Judgment affirmed.

66 Cal. 114

ERENBERG v. PETERS. (No. 8,461.)

Filed November 20, 1884.

WRITTEN AGREEMENT—HOW VARIED BY ORAL AGREEMENT.

An oral agreement which alters an agreement in writing is not valid or binding unless such oral agreement is executed.

Department 2. Appeal from the superior court of the city and county of San Francisco.

J. B. Hart, for appellant.

Jos. Rothschild, for respondent.

BY THE COURT. Action to recover rent due on a written lease; defense, a substituted oral agreement. On the seventh of January, 1874, plaintiffs leased to defendants, by a lease in writing, a lot of land for five years, and during the term defendants erected a building thereon. On the seventh of January, 1879, another lease was executed for a term from February 11, 1879, to January 31, 1884. During the second term, to-wit, January 27, 1881, the building was burned. An oral agreement was then made between plaintiffs and defendants that the plaintiffs would erect another building on the lot, and that the plaintiffs would rent such building to defendants at an increased rent of \$10 per month for the unexpired term of the second lease. The plaintiffs omitted to erect the building, and the defendants paid no rent after the fire. The court below held that the lease of January 7, 1879, was still in force, and that the oral agreement was invalid and not binding, as it was not an executed oral agreement. We think the court was correct.

Sec. 1698, Civil Code. "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, *and not otherwise.*" We think the case is clearly within this section. The lease was a contract, not only on the part of the lessors, but on the part of the lessees, viz., to pay the rent named therein. The agreement set up by the defendants would have the effect of altering the contract.

Judgment affirmed.

66 Cal. 104

McCLOSKEY, Adm'r, v. CITY AND COUNTY OF SAN FRANCISCO.
(No. 8,323.)

Filed November 18, 1884.

CONTRACT—ASSIGNMENT—EFFECT OF NOTICE.

Where a city, having notice of the assignment of a contract, and that the assignee was entitled to the money thereunder, applied part of the money due under the contract to the payment of workmen of the original contractor for work done by them upon the job for such contractor, the contract in the hands of the assignee is not affected by such payment.

Department 1. Appeal from the superior court of the city and county of San Francisco.

J. F. Cowdery, for appellant.

J. M. Wood, for respondent.

MCKEE, J. This was an action to recover a balance due upon a contract in writing by which the defendant promised to pay Thomas Barden the contract price of five cents per cubic yard for grading Jefferson square in the city and county of San Francisco, payment to be made when the work was finished.

On the thirteenth of April, 1873, the work called for by the contract was finished; and the defendant, in performance of the contract on its part, paid to the plaintiff's intestate, as assignee of the original contractor, the moneys due for the work, except a balance of \$1,260, which it refused to pay to him because it had applied the money to pay workmen of the original contractor for work and labor done by them upon the job for the contractor, and for which he was liable to them. But when the defendant applied the money for that purpose, it had notice of the assignment of the contract to the plaintiff, and that the right to the money was vested in him. The contract in the hands of the assignee was, therefore, not affected by the payment of the money to the creditors of the assignor. But it is contended that the contract itself was not assignable, because "it contained a condition that it should be strictly non-transferable, and that neither of the contracting parties shall be permitted to assign or transfer the same, except by the consent of the majority of the board of supervisors."

The contention, however, is not predicated upon the record in the case, for the finding of the court below is that the board of supervisors consented to the assignment.

There is no error in the record. Judgment and order affirmed.

We concur: ROSS, J.; MCKINSTRY, J.

2 Cal. Unrep. 401

JOHNSON, Ex'r, etc., v. HANCOCK and others. (No. 9,339.)

Filed November 18, 1884.

EJECTMENT—NEW TRIAL—JUDICIAL DISCRETION.

Where, in an action of ejectment, it was clearly established that plaintiff had possessory title, and that the withholding by defendants was unlawful, and judgment went for defendants, it is a proper case for granting a new trial, and the court in doing so does not abuse its discretion.

In bank. Appeal from the superior court of San Diego county.

O. W. Paine and Work & Titus, for appellants.

Will M. Smith, for respondent.

BY THE COURT. The plaintiff commenced an action of ejectment for certain lands described in the complaint, situate in the county of San Diego. Defendants had judgment, and the court granted plaintiff's motion for a new trial. This appeal is by defendants from the order of the court below granting the motion for a new trial. The evidence in the case clearly established plaintiff's title—possessory title, at least—to the land in controversy, and the unlawful withholding thereof by the defendants, the appellants. The occupancy and cultivation of the land, as well as an actual residence thereon, by plaintiff's testatrix, and the subsequent entry thereon by the defendants, all affirmatively appear in the evidence. It was with license, too, of the plaintiff, and under a full recognition of his right to the possession, that the defendants made the first entry upon the premises in controversy, and, after having surrendered the possession thereof, they made a second entry, which was without license and wrongful, for the avowed purpose of holding the possession until a certain claim or money demand made by Hancock's daughter was satisfied.

We think it was a proper case for a new trial, and there was no abuse of discretion in granting the same. This court will not presume error. *Thompson v. Monrow*, 2 Cal. 99.

Order affirmed.

66 Cal. 103

PEOPLE v. HICKS. (No. 10,984.)

Filed November 18, 1884.

CRIMINAL LAW—INFORMATION FOR ROBBERY—AVERMENTS.

An allegation in an information for robbery, "that the property taken was the personal property in the possession of Frederick Schwartz, * * * and that the same was taken from the person of and against the will of him, the said Schwartz," is a sufficient averment that the property belonged to Schwartz, and that it was taken from him by the defendant.

Department 1. Appeal from the superior court of Yuba county.

E. A. Davis, for appellant.

The Attorney General, for respondent.

McKEE, J. The only point made by the appellant in this case is that "the information fails to allege that the property taken was the property of some person other than the defendant." But the information contains this averment, viz.: "That the property taken was the personal property in the possession of Frederick Schwartz, * * * and that the same was taken from the person and against the will of him, the said Schwartz." We think this is a sufficient averment that the property belonged to Schwartz, and that it was taken from him by the defendant.

Judgment affirmed

We concur: ROSS, J.; MCKINSTRY, J.

66 Cal. 116

GILMAN v. CURTIS. (No. 8,649.)

Filed November 19, 1884.

COLLATERAL SECURITY—ASSIGNMENT OF LIFE INSURANCE POLICY—ADVANCES—TITLE.

Where a life insurance policy is assigned, to be held by the assignee as collateral security for certain advances to be and which were made by him, the legal title to the policy passes by such assignment to him, and the interest of the assignor then is in what remains of it after the advances for the security of which it was assigned have been satisfied, and the assignee cannot be made to surrender it to the assignor until the advances made by him are repaid.

In bank. Appeal from the superior court of the city and county of San Francisco.

C. F. Hanlon and *Geo. W. Tyler*, for appellant.

H. G. Sieberts and *Geo. F. Sharp*, for respondent.

ROSS, J. Taking the most favorable view for the plaintiff of this case as presented, it is clear that the decree entered in the court below cannot stand. Conceding that it appears with sufficient certainty that the policy in question was assigned by the plaintiff to the defendant, to be held by him as collateral security for certain advances to be and which were made by him, the legal title to the policy passed by the assignment to the defendant. The court should not, therefore, have adjudged the plaintiff the owner of the policy, and entitled to receive from the insurance company the whole amount due upon it. The interest of the plaintiff in the policy, upon that condition of fact, is in what remains of it after the advances for the security of which it was assigned have been satisfied, and defendant cannot be made to surrender it to the plaintiff until the advances made by him are repaid. But the special issues, which were adopted by

the court below as its findings, are indefinite, uncertain, and inconsistent. For example, upon an important question in the case the answers of the jury to questions propounded were as follows:

"(8) When plaintiff reassigned the policy to her mother, did she make such assignment absolute for the benefit of her mother? *Answer.* For the benefit of her mother. (9) If such assignment was not made absolutely and solely for the mother's benefit, was it made with an understanding that Mrs. Curtis or defendant, Gilbert Curtis, should hold the policy subject to a trust in favor of plaintiff? *A. Yes.*"

Judgment and order reversed, and cause remanded, with leave to the parties to amend their pleadings, if they shall be so advised.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; MYRICK, J.; MCKEE, J.; THORNTON, J.; MCKINSTRY, J.

2 Cal. Unrep. 406

KELLEHER v. KENNEY. (No. 8,297.)

Filed November 21, 1884.

NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—MATERIALITY—REVERSAL.

If alleged newly-discovered evidence is merely cumulative, and every material fact is contradicted by counter-affidavits, and an appellate court cannot clearly say that the court below erred in refusing it, the order refusing it will not be reversed.

Department 2. Appeal from the superior court of the city and county of San Francisco.

P. G. Galpin, for appellant.

Pillsbury & Titus, for respondent.

BY THE COURT. Plaintiff moved for a new trial on newly-discovered evidence. Affidavits and counter-affidavits were filed. We are not informed, except by the certificate of the clerk, that the affidavits were used on the motion; but, no point being made thereon, we pass to the point presented. The evidence set forth in the affidavits of plaintiff was clearly cumulative. It was in effect denied by the counter-affidavits. The real issue on the trial of the case was whether plaintiff's intestate had delivered to defendants certificates for the 600 shares of stock in dispute, not whether they were delivered on the tenth of December, 1877, or on or about the tenth of January, 1878. The date of the delivery was not the material fact. If the alleged newly-discovered evidence is merely cumulative, and every material fact is contradicted by counter-affidavits, and the appellate court cannot clearly say that the court below erred in refusing it, the order refusing it will not be reversed. *Doyle v. Sturla*, 38 Cal. 456. See, also, *People v. McCauley*, 45 Cal. 146.

Order affirmed.

66 Cal. 105

MCNEIL v. FIRST CONGREGATIONAL SOCIETY OF SAN FRANCISCO.
(No. 8,217.)

Filed November 19, 1884.

1. MEXICAN LAW IN CALIFORNIA—DISTRIBUTION OF ESTATES OF DECEDENTS—
ACT OF APRIL 22, 1850, CONSTRUED—LIMITATIONS.

The Mexican law existing at the time of the cession of California to the United States governed the distribution and descent of the estate of a person dying intestate after the organization of the government of the state, and before the passage of any state legislation regulating the administration, distribution, and descent of estates of deceased persons. According to that law, immediately on the death of an intestate, his heirs succeeded to the estate and became personally responsible for the debts of the deceased, and no administration, in the common-law sense, was had. Neither the alcalde courts, courts of the first instance, nor the probate court, under the act of April 22, 1850, relative to such estate, acquired or had jurisdiction to administer such estate; the statute (Code Civil Proc. § 1573) limiting to three years the time within which an action may be maintained by an heir or his grantee for the recovery of real estate sold by an executor or administrator at a judicial sale which was void because such probate court had no jurisdiction.

2. GUARDIAN APPOINTED BY FOREIGN COURT—SALE OF LAND BY.

The guardian of a minor appointed by the courts of a foreign state is not authorized, as such, to sell lands situate in this state which belong to his ward.

3. NATURAL GUARDIAN—LEGISLATIVE AUTHORIZATION TO SELL LAND.

The mother of a minor has no authority, as his natural guardian, to transfer his real property. The mother of Francis W. Paty, as such, did not acquire power to convey his real property under the act of May 6, 1861, authorizing his guardian to sell real estate.

4. PARTNERSHIP—SALE OF LANDS BY ONE PARTNER.

The transfer of a legal title to a purchaser for value and without notice discharges the equitable interest of a partner in the land which was purchased during the partnership by his copartner, the transferrer.

5. GUARDIAN—SALE OF LANDS—LIMITATIONS.

The statute (Civil Code, § 1806) prescribing three years after termination of his guardianship as the time for the maintenance by a minor of an action for the recovery of land sold by his guardian, only applies to sales by guardians appointed by probate courts of this state.

6. TENANT IN COMMON—POSSESSION OF.

It is presumed that the possession of one tenant in common is for the benefit of all.

Department 1. Appeal from the superior court of the city and county of San Francisco.

Stetson & Houghton, for appellants.

Jos. Naphtaly and Cope & Boyd, for respondents.

McKEE, J. Ejectment to recover an undivided interest in a portion of 50-vara lot No. 145 in the city and county of San Francisco. From the unchallenged findings of the court it appears that William Paty, on the thirteenth of November, 1849, acquired title to an undivided interest in the premises in dispute. After his acquisition of title he died, on the fourteenth of February, 1850, in the city of San Francisco, intestate, and leaving surviving him, as his legal heirs, Martha Ann Paty, his widow, and three children, Ellen D., Charles M., and Francis W. Paty. Of these children Charles M. died in the

year 1857, a minor, unmarried and without issue. From Francis W. the plaintiffs claim to have derived his title to the premises; and they were, at the commencement of the action, vested with all the right, title, and interest in said premises which the said Francis W. inherited as the heir at law of his deceased father and brother. Upon the case made by them they were, therefore, entitled to judgment for that interest against the defendants in possession, unless the latter showed a superior right to the possession. Admittedly, the defendants were in possession, and had been continuously since the year 1852, by themselves and their grantor, under title to an undivided three-fourths interest in the property, derived from two of the heirs of the said William Paty, deceased. But they also claimed to have acquired the interest in the property of Francis W. as another of the heirs at law of said deceased. This claim of title is attempted to be derived from four sources: *First*, from a decree of confirmation by the probate court of San Francisco county of an administrator's sale of the real estate of said deceased made under an order of said court; *second*, from a deed purporting to convey all the interest of Francis W. as an infant heir at law of his deceased father and brother, executed by the mother of said infant, under an act of the legislature of the state of California, approved May 6, 1861, entitled an act "To authorize the guardian of Francis W. Paty to sell and convey certain real estate;" *third*, from a deed purporting to convey all the premises in dispute, executed on the twenty-eighth of February, 1852, by John Paty, who was a brother and surviving partner of William Paty, deceased; *fourth*, from the statute of limitations.

1. As to the first source, William Paty died February 14, 1850, after the organization of the state government, and before there was any legislation by the state regulating the administration, descent, and distribution of the estates of persons dying intestate within the state. His estate, therefore, descended and was subject to the operation of the Mexican law, in existence at the time of the cession of California to the United States. As was said in *Ryder v. Cohn*, 37 Cal. 87:

"It is a well-known principle that, upon a conquest or cession of a foreign territory, the laws of the former sovereign will prevail until they are abolished or supplanted by others enacted by the new sovereign."

And the constitution of 1849 embodied the same principle. Section 1 of the schedule provided "that * * * all laws in force at the time of the adoption of the constitution, and not inconsistent therewith, shall continue, until altered or repealed by the legislature, as if the same had not been adopted."

No attempt was made to alter or repeal the Mexican law upon the subject of descent and distribution of estates of deceased persons until April 22, 1850. On that day the legislature, by an act entitled "An act to regulate the settlement of the estates of deceased persons," (St. 1850, p. 377,) regulated the subject of descent and distribution,

and conferred upon the newly-appointed county courts, when sitting for the transaction of probate business, jurisdiction of such estates. About two months before that day, what purported to be letters of administration upon the estate of William Paty, deceased, were granted by John W. Geary, first alcalde and *ex-officio* judge of the court of the first instance of the district of San Francisco, to John H. Gleason and John Paty, and those persons claimed to act as administrators of said estate. But in *Coppinger v. Rice*, 33 Cal. 408, it was held that, under the Mexican law, on the death of an intestate, the heirs succeeded immediately to the estate and became personally responsible for the debts of the deceased, and that no administration, in the common-law sense, was needed or could be had at any time. By force of the Mexican law, therefore, the estate of the intestate, William Paty, was transmitted to and became vested in his heirs; and it was not subject to administration in the alcalde's courts or court of first instance, nor to the operation of the probate law subsequently passed by the legislature. The order of the probate court, made after the passage of the act of April 22, 1850, authorizing the persons appointed by the alcalde, as administrators of the estate, to sell the real estate of the intestate, was therefore void for want of jurisdiction. That act, as has been determined by a series of decisions, had no application to the estates of persons who died before its passage. *Grimes v. Norris*, 6 Cal. 624; *Tevis v. Pitcher*, 10 Cal. 466; *De La Guerra v. Packard*, 17 Cal. 193; *Soto v. Kroder*, 19 Cal. 97; *Downer v. Smith*, 24 Cal. 114; *People v. Senter*, 28 Cal. 502; *Wilson v. Castro*, 31 Cal. 420; *Coppinger v. Rice*, *supra*; *Seaverns v. Gerke*, 3 Sawy. 363.

Ryder v. Cohn, *supra*, is not in conflict with those cases. In that case the question of title to the property in controversy in the case arose out of a final judgment founded upon proceedings which were had wholly in the court of first instance. The estate of the intestate had never been in the probate court. It is true that a majority of the court did hold that the court of first instance was a *de facto* court, exercising general and unlimited jurisdiction in civil cases, and in matters of administration on the estates of deceased persons, prior to the enactment of a code of laws in this state in 1850, and that the judgments of said court, and titles acquired under them, were valid, notwithstanding they might be void if tested by the strict rules of the common law. Followed, however, to its logical conclusions, that decision would result in establishing the proposition that the court of first instance, before the code of laws enacted in 1850 went into effect, had jurisdiction of the estates of intestates, and that the probate court subsequently established and organized under the Code of 1850 had not, unless jurisdiction of such estates was conferred upon it by the Code. But, although the constitution of 1849 provided for the removal of all cases pending in tribunals under the Mexican law to courts to be created by the legislature, (section 2, Schedule,) no pro-

vision was ever made by the legislature, in carrying out the provisions of the constitution in that regard, for the removal of proceedings in estates pending in the court of first instance to the probate court. The courts of first instance and alcalde courts were suspended by an act passed on the twenty-eighth of February, 1850, (St. 1850, p. 77,) and by the provisions of that act "all cases and proceedings pending before courts of first instance and alcalde courts" were made transferable to the newly-created district courts and justices' courts. But neither in that act, nor in the subsequent act of April 22, 1850, was there any provision made for the transfer of causes or proceedings pending in those courts to the probate court. The probate court, therefore, acquired no jurisdiction of the estate of William Paty, deceased, although, as a matter of fact, the records and papers in the administration of the estate were sent to and deposited in the probate court.

2. As to the second source from which defendants claim title, the deed executed by the mother of Francis W. Paty under the act of the legislature was void, because, although she had been appointed guardian of the person of the minor by the probate court of the state of Massachusetts and by the supreme court of the Hawaiian islands, she had never been appointed guardian of his person and estate by the probate court of this state, (*Paty v. Smith*, 50 Cal. 153,) and, as the natural guardian of her infant son, the mother had no power to transfer his real property, nor did she derive power for that purpose from the act of the legislature. *Brenham v. Story*, 39 Cal. 179.

3. As to the third source, the deed from John Paty was ineffectual to transfer the title of Francis W. in the estate of his deceased father, because, although there was, at the time of the acquisition of the title to the property by William, a partnership between him and his brother John, the grantor, under the firm name of J. & W. Paty, in which they recognized each other as equal partners in all their business transactions, and the partnership continued until it was dissolved by the death of William; yet the court finds that the deed was not executed by John in settlement of the affairs of such co-partnership, nor for the purposes of a settlement thereof, nor to convey the property in controversy as surviving partner of the firm; and "that the plaintiffs purchased and acquired the rights of Francis W. in the premises for value, and without notice of any co-partnership interest of John Paty in the premises, or of any co-partnership claim thereto by any one." Assuming that John Paty, as the surviving partner of William, had an interest in the land purchased by the latter, it was a mere equity, which was subject to be discharged by a transfer of the legal title to a purchaser for value and without notice. 1 Lead. Cas. Eq. (White & Tudor,) 287; *Smith v. Yule*, 31 Cal. 180. And when the plaintiffs acquired the title of Francis Paty, as found by the court, they took it against any equity existing in John Paty

as the surviving partner of William, and held it free from all trusts of which they had no notice at the date of their purchase. Therefore the title acquired by them was not affected by the proceedings in the probate court on the estate of William Paty, deceased, nor by the deed executed by the mother of their grantor, Francis W. Paty, nor by the deed of John Paty, the brother of the intestate, (*McNeil v. Polk*, 57 Cal. 323,) and they became tenants in common with the defendants in possession.

4. As to the statute of limitations the defendants pleaded:

"That said plaintiffs ought not to have or maintain this action, because the alleged cause of action set out in said complaint is barred by the provisions of sections 318, 319, 320, 322, and 343, and sections 1573 and 1806 of the Code of Civil Procedure of the state of California."

Section 1806 prescribes three years next after the termination of the guardianship of a minor for a recovery by the minor or his grantee of real estate sold by the guardian. That section has no application to this case, because there was no guardian, and no sale by a guardian appointed by a probate court in this state. Section 1573 prescribes three years next after sale of an estate by an executor or administrator, under the provisions of the probate law, for the recovery of the real estate sold; but that section is not applicable, because the premises in controversy were not subject to sale, and were not sold under its provisions. *Harlan v. Peck*, 33 Cal. 515.

The other sections relate to the bar of the statute of limitations of five years. But Francis W. Paty was born on the sixth of December, 1845, and the action in hand was commenced on the fourth of December, 1871. So that under section 328, Code Civil Proc., his right was not barred. Besides, as the plaintiffs and the defendants were tenants in common of the land, the defendants are presumed to have held the possession for the benefit of themselves and the plaintiffs. There is no finding that this possession became adverse to the plaintiffs at any time until the defendants refused to let the plaintiffs into possession, on their demand made to be let in, just before the commencement of this action.

Upon the findings the plaintiffs were entitled to judgment. Judgment reversed, and cause remanded, with directions to the court below to enter judgment upon the findings in favor of the plaintiffs.

Ross and McKINSTRY, JJ., concurring. No sale of the interest of the deceased, William Paty, in the real estate in question was ever made by order of the court of first instance, and as the legislature of the state made no provision for the transfer of proceedings relating to the administration of the estates of deceased persons from the courts of first instance to the court of probate provided for by the probate act of April 22, 1850, the probate court under that act acquired no jurisdiction of the estate of the deceased Paty, who died February 14, 1850. *Grimes v. Norris*, 6 Cal. 624; *Tevie v. Pitcher*, 10 Cal. 466;

De la Guerra v. Packard, 17 Cal. 193; *Soto v. Kroder*, 19 Cal. 97; *Downer v. Smith*, 24 Cal. 114; *People v. Senter*, 28 Cal. 502; *Wilson v. Castro*, 31 Cal. 420; *Coppinger v. Rice*, 33 Cal. 408; *Rider v. Cohn*, 37 Cal. 69. Nor did the defendants acquire the title of Francis W. Paty in the premises by any of the other means relied on, and which are stated in the opinion of Mr. Justice McKEE.

We concur in the judgment.

2 Cal. Unrep. 403

MARTIN v. HILL and others. (No. 7,923.)

Filed November 20, 1884.

JUDGMENT AFFIRMED—CONSTRUCTION OF CONTRACT.

Upon a construction of the agreement which is the subject of the suit, judgment affirmed. THORNTON, J., dissenting.

In bank. Appeal from the superior court of the county of Marin.
E. S. Lippitt, for appellant.

A. W. Thompson, for respondents.

ROSS, J. Each of the parties to the agreement we are called upon to construe in this case was, at the time of its execution, in possession of a distinct portion of the Bojorques rancho, for the partition of which rancho an action of partition, entitled *Gates v. Salmon et al.*, was then pending in one of the district courts of the state. Some of the parties to the agreement were holding under deeds from tenants in common of the rancho, purporting to convey the distinct parcels so possessed, and others of them were holding under deeds from tenants in common of the rancho, purporting to convey an undivided interest therein. The purpose of the agreement in question was to secure to the respective parties to it the portions of the rancho of which they were respectively in possession; and, lest it should turn out in the partition that their respective interests should not be sufficient to cover their respective possessions, it was determined to purchase, in the name of certain trustees, other and sufficient undivided interests in the rancho to carry out the wishes of the parties. The money required for such purchases was to be contributed by the parties to the agreement in proportion to the number of acres and value of the land included within their respective possessions. All this is embodied in the agreement, as we read it. Omitting some of its contents not necessary to be stated, the agreement then proceeds:

"And it is further agreed that the title so acquired shall be used for and devoted to the purpose of quieting title to the said lands so in possession severally of the parties hereto, and for this purpose, and for all purposes under this agreement, it is stipulated that the parties hereto, known as claimants by 'special location,' shall be deemed and admitted to be, respectively, the owners in fee-simple of the tracts of land described in their respective deeds

under said special location, and that, for any lands in their possession not included within the lands described in their said deeds, they, and each of them, may purchase of the parties hereto, acting jointly as aforesaid, such title as may be requisite for their protection in and acquirement of title to the said lands, outside of the special locations or not included within said descriptions in the deeds, and the price to be paid therefor shall be at the rate per acre that the title by them so bought has cost in the original purchase of undivided interests in the whole *rancho*,—the number of acres pertaining to the undivided interests so bought to be ascertained from the report of the commissioners in partition, without reduction by reason of special locations. And the parties claiming as tenants in common shall also have the privilege of buying, in the same manner and at the same price as last above provided, whatever number of acres they may have in possession in excess of their present undivided interest in said *rancho*, as shown by the report and survey of said commissioners in partition. And it is further agreed that all property, advantages, and profits derived from purchases made under this agreement shall belong to the parties hereto in proportion to their several contributions, and that none of the provisions of this agreement shall inure to, or in any way protect, any person not a party to these presents."

The plaintiff, who was a party to this agreement, was, at the time of its execution, the owner of an undivided interest in the *rancho*, and was in the possession of that portion thereof involved in the present action. He derived his undivided interest from one Walker, pending the partition suit, Walker retaining other interests therein. Subsequent to the agreement, and pending the partition action, the trustees named purchased certain undivided interests in the *rancho* for the purpose contemplated by the agreement, the money with which the purchases were made being contributed by the respective parties to the agreement in proportion to the number of acres and the value of the land embraced in their respective possessions. The plaintiff was not made a party to the action of partition after his purchase from Walker of an undivided interest in the *rancho*, but with respect to that interest the action was continued in the name of Walker; and in the final decree of partition there was awarded to Walker a portion of the *rancho* equivalent to the undivided interest conveyed by him to the present plaintiff, and to the undivided interest retained by him after that conveyance. The portion of the *rancho* so awarded to Walker did not include any portion of the tract actually possessed by this plaintiff, but the tract actually possessed by the plaintiff was, in and by the final decree in the action of partition, awarded to the trustees named in the agreement in question in lieu of the undivided interest in the *rancho* purchased by them pending the action of partition under and by virtue of the agreement, and with money contributed in accordance with its provisions. And the plaintiff brings this action to compel the assignee (with notice) of the trustees to convey to him the title to the portion of the *rancho* actually possessed by him at the time of the execution of the agreement, upon the payment by him, which he tenders, of a price at the rate per acre paid by the trustees in their purchase of the undivided interests, in pursuance of the provisions of the contract.

It will be seen, therefore, that the case turns upon the construction to be placed on the agreement in question, the most material part of which has been hereinbefore quoted. If, under that agreement, the plaintiff could permit the undivided interest which he held in the *rancho* at the time of the execution of the agreement to be set off in the name of his grantor so as not to include any part of the land in his actual possession, and then claim to purchase the whole of the land so actually possessed by him from the trustees under the agreement, then the plaintiff should recover in the action. If, on the other hand, the purpose of the agreement was to enable plaintiff to obtain the title to such portion of the land actually possessed by him as his individual interest might prove insufficient to cover, then he should not succeed in the present suit. The latter we think the true construction of the agreement, and the judgment and order are therefore affirmed.

We concur: SHARPSTEIN, J.; MCKINSTRY, J.

I concur in the judgment: MCKEE, J.

I dissent: THORNTON, J.

66 Cal. 117

CALKINS v. STEINBACH. (No. 9,192.)

Filed November 27, 1884.

1. TENANT IN COMMON—REDEMPTION BY.

Where the whole of the common property is redeemed from a sale under a judgment against all of the co-tenants, by one tenant in common, he thereby acquires an equitable lien on the interest of his co-tenants for their *pro rata* of the expenses made by him in effecting the redemption, and may recover the same in an action therefor, and is entitled in such action to a decree that in default of the payment thereof the interest of his co-tenants in the land be foreclosed.

2. REDEMPTION BY JUDGMENT DEBTOR—EFFECT OF.

The character of the person making a redemption determines the effect of redeeming property sold subject to redemption. Where the judgment debtor, or his successor in interest, makes the redemption, the effect of the sale is terminated, which fact is made to appear of record by a certificate of redemption, and a note thereof on the margin of the certificate of sale. But where made by a "redemptioner," as defined in the statute, (Code Civil Proc. § 701, subd. 2,) and no further redemption be made within the statutory period, he is entitled to a sheriff's deed conveying to him the interest of the judgment debtor therein.

Department 1. Appeal from the superior court of the county of Santa Barbara.

B. S. Brooks and Gordon Blanding, for appellant.

Estee & Boalt and Paul R. Wright, for respondent.

Ross, J. The case made by the complaint is this: Three persons—Gallagher, Mahe, and Pavillier—were seized in fee of certain lands. Being so seized, they executed a mortgage upon the lands to secure the payment of their promissory note to Gasper Orena and wife. The mortgage was subsequently foreclosed, because of default in the payment of the money, and under and pursuant to the decree of foreclosure the lands were regularly sold at public auction to one Le Roy for \$18,837.89, who received from the sheriff a proper certificate of sale, which was duly recorded in the county where the lands were situated. Within six months after the sale, one of the mortgagors and judgment debtors—Gallagher—executed to the plaintiff a deed conveying to him all of his (Gallagher's) interest in the lands, which deed was duly recorded in the proper county; and within six months from the date of the sheriff's sale, plaintiff, as successor in interest of the judgment debtor Gallagher, redeemed the lands by paying to the sheriff the full amount of money necessary for that purpose, aggregating \$20,985.40, upon the receipt of which the sheriff executed to plaintiff a proper certificate of redemption, which was duly recorded in the office of the recorder of the county, and afterwards paid over the redemption money to Le Roy, who received it in full satisfaction of his rights as purchaser at the foreclosure sale. Prior to the plaintiff's purchase from Gallagher, the defendant Steinbach acquired by purchase the interest of Pavillier in the lands, a deed for which was put on record, and subsequently, but before the commencement of the present action, Steinbach acquired, through a sale made under and pursuant to proper probate proceedings, all of the interest of the estate of Mahe in the lands, Mahe having deceased.

The complaint alleges these facts and then avers:

"That more than sixty days have expired since the plaintiff redeemed the above-described land and premises from foreclosure sale, and neither of the defendants herein (defendants being Steinbach, one Dussol, and the administrator of the estate of the deceased Mahe) have redeemed, or offered to redeem, any part or portion of said land or premises, or interest therein, from him; that all of the defendants herein have had notice of plaintiff's said redemption, and plaintiff has frequently since said redemption demanded of the said defendants, and each of them, that they and each of them pay to the plaintiff such proportion of the said sum of \$20,985.40, so as aforesaid paid by plaintiff in redeeming said land and premises, together with interest thereon, as the interest of each of said defendants in said land and premises bears to the whole thereof; that, nevertheless, the said defendants claim some right or title to said land and premises by reason of the former co-tenancy as aforesaid; that the defendants, and each of them, have hitherto wholly refused, and still do continue to refuse, to pay to plaintiff or contribute any portion of said money so paid by him on said redemption."

And the prayer of the complaint is:

"(1) That the defendants, and each of them, be forever barred from setting up any claim to the said land and premises, or any part thereof. (2) That plaintiff be decreed to be the owner in fee of the whole of said land and prem-

ises. (3) For costs of suit, and for such other or further relief as to the court may seem meet and equitable."

The court below adjudged the plaintiff the owner in fee of the entire lands, and further decreed that the defendants, and each of them, "be and are forever barred from setting up any claim to said lands and premises, or any part thereof." The judgment is clearly erroneous. The effect of the redemption by plaintiff was precisely the same as if it had been made by Gallagher. It was as successor in interest of Gallagher that plaintiff became entitled to redeem. Code Civil Proc. § 701. Upon his redemption the effect of the sale was terminated, and he thereupon acquired an equitable lien upon the interests of his co-tenants in the lands for their just proportion of the money paid by him in effecting the redemption; and he had his action to recover such proportion, and a decree to the effect that in default of such payment the interests of the co-tenants in the lands be foreclosed. Those were the relative rights and duties of the respective parties. There is no such thing under our statute as a redemption from a successor in interest of one of two or more judgment debtors who redeems lands sold subject to redemption. Our Code provides for the redemption of the property so sold—*First*, by the judgment debtor or his successor in interest in the whole or any part of the property; and, *second*, by a creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold.

The persons mentioned in the *second* subdivision of the statute are termed redemptioners. If property sold be redeemed by such a redemptioner, another redemptioner may, within 60 days after the redemption, again redeem it from the last redemptioner, on making the payments prescribed by section 703 of the Code of Civil Procedure. And the property may be again, and as often as a redemptioner is so disposed, redeemed from any previous redemptioner within 60 days after the last redemption, upon making the payments and taking the steps prescribed by the statute. If so redeemed, whenever 60 days have elapsed, and no other redemption has been made, and notice thereof has been given, and the time for redemption has expired, the last redemptioner or his assignee is entitled to the sheriff's deed. If, however, the debtor, who in all cases has the entire period of six months from the date of the sale for the purpose, redeem, the effect of the sale is terminated, and he is restored to his estate. The same effect must be held to attend a redemption by the successor in interest of the judgment debtor, since the right of redemption, which is by the statute given to the judgment debtor, is also given to his successor in interest. Where the redemption is by the debtor, (or his successor in interest,) the person to whom the payment is made is required to execute and deliver to him a certificate of redemption, acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property, which certificate must be

filed and recorded in the office of the recorder of the county in which the property is situated, and the recorder is required to note the record thereof in the margin of the record of the certificate of sale. Sections 701-703, Code Civil Proc.

It will be seen, therefore, that the effect attending a redemption of property, sold subject to a redemption, depends upon the character of the person making the redemption. If made by a "redeptioner," (defined in the second subdivision of section 701 of the statute,) and there be no further redemption within the statutory period, the redemptioner is entitled to a deed from the sheriff, conveying to him the interest of the judgment debtor therein. But if made by the judgment debtor or his successor in interest, the effect of the sale is terminated, which fact is made to appear of record by a certificate of redemption and a note thereof on the margin of the certificate of sale. The conduct of the defendant, Steinbach, as evidenced by his answer, does not commend itself to a court of equity, but it has not worked a forfeiture of any of his interest in the lands in question. He is bound to the plaintiff for such proportion of the redemption money, with interest, as his interest in the lands bears to the whole thereof; and, as security for payment of such sum, plaintiff holds an equitable lien upon all of the interest of Steinbach in the property. To enforce the relative rights and obligations of the respective parties, it is necessary that this amount be judicially ascertained, a day fixed within which it be paid, and a decree to the effect that in default of such payment defendant be forever foreclosed of all right or interest in the lands.

Judgment and order reversed, and cause remanded for further proceedings, with leave to the parties to amend their pleadings, if they shall be so advised.

We concur: McKEE, J.; McKINSTRY, J.

66 Cal. 123

EASTIN v. BANK OF STOCKTON. (No. 8,045.)

Filed November 22, 1884.

1. MALICIOUS PROSECUTION—PROBABLE CAUSE A QUESTION OF LAW.

In an action for malicious prosecution, it is a question of law for the court to determine from the facts, as found by the jury, whether they constitute probable cause or not.

2. SAME—DAMAGES—ALLOWANCE OF EXPENDITURES.

The successful plaintiff in an action for malicious prosecution is entitled to recover only so much of his expenditures, made in defense of the action held to be malicious, as were *reasonably* laid out and expended.

3. SAME—MALICIOUS PROSECUTION OF CIVIL ACTION.

A suit for malicious prosecution of a civil action may be maintained, though no process other than the summons was issued therein.

In bank. Appeal from the superior court of Stanislaus county.

Byers & Elliot, for appellants.

W. E. Turner and *D. S. Terry*, for respondent.

Ross, J. The cause of action set forth in the complaint is that in the month of August, 1874, the plaintiff executed to the firm of J. H. Barney & Co. his two certain promissory notes,—one for the sum of \$160, and the other for the sum of \$341,—which notes he paid in December of the same year at the bank of Stockton, with the knowledge of the president, cashier, and managing agent of the bank; that after the notes had been so paid and had been delivered up, plaintiff lost them, and the bank, by some means to the plaintiff unknown, became possessed of them; that thereafter, and in the year 1876, the bank and its co-defendant, Hogan, entered into a conspiracy for the purpose of blackmailing plaintiff, and extorting money from him by means of the possession of the notes and the supposed inability of the plaintiff to produce evidence of their payment, and that it was agreed and understood between the bank and Hogan that each should receive an equal part of whatever money they might succeed in extorting from the plaintiff, and that each should bear an equal part of the expenses incurred in carrying out the conspiracy; that, in pursuance of the conspiracy, defendant, on the fifth of August, 1878, willfully, maliciously, and without reasonable or probable cause, and with intent to vex, harass, and injure the credit of plaintiff, and to put him to cost in and about his defense, or to compel him to submit to their extortionate demands, commenced an action in the district court of the Fifth judicial district of the state of California for the recovery of the sums for which the notes had been given, but which defendants at the time well knew had been fully paid; that process in that action was served on the present plaintiff, who was obliged to employ counsel to defend the suit at a cost of \$600, and to incur a further expenditure in defense thereof of \$75; that by reason of the commencement and prosecution of that action the plaintiff was damaged in the further sum of \$5,000 by way of injury to his credit, neglect of his business, etc.; that the action resulted in a judgment for the then defendant—plaintiff here.

The answer of the defendants put in issue the material averments of the complaint, and a trial was had with a jury, resulting in a verdict for the plaintiff for the sum of \$3,000; and judgment was entered against the defendants for that sum and costs.

A large number of objections were taken by the defendants to the proceedings in the court below; among them, exceptions to the giving and the refusal to give certain instructions to the jury. The instructions given were erroneous in several particulars. In several instances the jury was told in effect that it was for them to decide whether or not there was probable cause for the prosecution of the suit against the plaintiff. Thus, the court told the jury:

“If from the evidence you find that in the instituting of the suit of the *Bank of Stockton v. Eastin* there was no probable cause, and that the de-

defendants were actuated from malice, either actual or implied, then I charge you that in assessing the damages sustained by Eastin you are not limited to the actual amount paid out or expended by him," etc.

Again, the jury was told:

"If the facts offered to show a want of probable cause are undisputed, it is the sole province of the court to determine whether or not such evidence establishes a want of probable cause, and in that case the jury would have nothing to do with the matter. If, however, the facts are disputed, then it becomes your duty first to determine what are the facts proven, and next, under the instructions of the court, *to see whether those facts constitute a want of probable cause*. Now, in this case, that is a disputed proposition, and unless you find affirmatively from the testimony that there was a want of probable cause in the institution of the suit of the *Bank of Stockton v. Eastin*, then you must find for the defendant."

Continuing, the court said:

"In determining whether or not there was a want of probable cause in the bringing of that suit, the court calls your attention particularly to the fact which, in its judgment, will determine that question either one way or the other."

It is quite clear that by these instructions the court left it with the jury to say whether or not there was probable cause for the bringing of the suit against the plaintiff. In doing so, the court committed to the jury more than it was their legitimate province to determine, as was held in *Grant v. Moore*, 29 Cal. 652, and where this court said:

"The law makes it the duty of the judge, who tries an action for malicious prosecution, to instruct the jury that as they may find and determine certain questions of fact, properly submitted to them, to be true or untrue, so must be their verdict for the plaintiff or the defendant; not that they should determine the question of the want of probable cause or the contrary."

The court below also erred in instructing the jury, as it did, that in the event of their finding a verdict for the plaintiff it would be their duty to allow him all that he paid out and expended in the defense of the former suit, "both counsel fees and all other expenses paid out by him," without reference to whether such counsel fees and other expenses were reasonable and proper or not. Under no circumstances would plaintiff be entitled to recover extravagant and unnecessary fees and expenses.

As the case must be sent back for a new trial, it is proper to decide another question raised, and that is, whether in this state an action can be maintained for the malicious prosecution of a civil action in which no process other than the summons was issued. The weight of the authorities, American as well as English, is against the maintenance of such an action, and so are most of the text writers. The question has never been determined in this state, and we are therefore at liberty to adopt the rule that we think is founded on the better reason. The point was made in the case of *Smith v. George*, reported in 52 Cal. 344, but was not decided; the court holding that it was unnecessary to decide it, but remarking that "the adjudged cases in England and America are conflicting upon the question, and depend-

ing to a considerable degree, it would seem, upon the prevailing statutory provisions as to the recovery of costs by the defendant upon the determination of a civil action in his favor." The cases are collected and reviewed by Mr. Lawson in an instructive article upon the subject, published in the American Law Register, and which will be found in the twenty-first volume, at pages 281-353. The cases are too numerous to be here referred to in detail. The English cases which deny the right to maintain the action, stand upon the ground that the successful defendant is adequately compensated for the damages he sustains by the costs allowed him by the statute. Those costs, it seems, include the attorney's charges for preparing the case for trial in all its parts, the fees of the witnesses and the court officials, and even the *honorarium* of the barrister who conducted the case in court. The reason upon which the English rule rests would not, therefore, seem to apply here, where the costs recoverable under the statute are confined to much narrower limits. Under our system, the defendant may be subjected, or he may subject himself, to expenses not recoverable, even if the suit terminated in his favor; but of this he has no legal ground to complain when the suit is brought and prosecuted in good faith, because, as said in *Closson v. Staples*, 42 Vt. 209,—

"It is the ordinary and natural consequence of a uniform and well-regulated system to which all parties in civil actions are required to conform. But when the action is brought and prosecuted maliciously, and without reasonable or probable cause, the plaintiff asserts no claim in respect to which he had any right to invoke the aid of the law. In such cases the plaintiff, by an abuse of legal process, unjustly subjects the defendant to damages which are not fully compensated by the costs he recovers. The plaintiff, in such case, has no legal or equitable right to claim that the rule of law which allows a suit to be brought and prosecuted in good faith without liability of the plaintiff to pay the defendant damages, except by way and to the extent of the taxable costs, if judgment be rendered in his favor, should extend to a case where the suit was maliciously prosecuted without probable cause. But where the damages sustained by the defendant in defending a suit maliciously prosecuted, without reasonable or probable cause, exceed the costs obtained by him, he has, and of right should have, a remedy by action in the case."

Two other objections made to the maintenance of the action—that is to say: *First*, the claim that if such suits are allowed litigation will become interminable, because every unsuccessful action will be followed by another, alleging malice in the prosecution of the former; and, *second*, that if the defendant may sue for damages sustained by an unfounded prosecution the plaintiff may equally bring an action when the defendant makes a groundless defense—are well answered in the article already alluded to:

"To the first objection it is enough to say that the action will never lie for an unsuccessful prosecution unless begun and carried on *with malice and without probable cause*. With the burden of this difficult proof upon him, the litigant will need a very clear case before he will be willing to begin a suit of this character. The second argument fails to distinguish between the position of the parties, plaintiff and defendant, in an action at law. The

plaintiff sets the law in motion; if he does so groundlessly and maliciously, he is the cause of the defendant's damage. But the defendant stands only on his legal rights,—the plaintiff having taken his case to court, the defendant has the privilege of calling upon him to prove it to the satisfaction of the judge or jury, and he is guilty of no wrong in exercising this privilege."

Judgment and order reversed, and cause remanded for a new trial.

We concur: MYRICK, J.; MCKINSTRY, J.

MORRISON, C. J., *concurring*. In his charge to the jury the court said:

"I charge you that it will be your duty to allow him (the plaintiff) all that he paid out and expended in the defense of the former suit, both counsel fees and all other expenses paid out by him, and in addition thereto you may award such damages, in all not exceeding five thousand six hundred dollars, by way of exemplary or punitive damages."

I think the foregoing instruction erroneous. The jury was told that they should allow the plaintiff all *that he paid out and expended in the defense of the former suit*. The allowance in this respect should have been confined to such an amount as was *reasonably* laid out and expended. Without expressing any opinion on other points decided in the main opinion, I concur in the reversal of the judgment, on the ground above stated, and I think the action maintainable.

THORNTON, J., *concurring*. I concur in the judgment of reversal herein, on the ground that, assuming as true the strongest case which on a fair consideration of the evidence is made out against the defendants, there is no want of probable cause for the course which they pursued.

I agree that in a proper case an action such as the one before us can be maintained against an attorney; but it cannot, in my opinion, be held that an attorney who is told by his client that a note is due and unpaid is guilty of the malicious prosecution of a suit when he brings an action on the note against its maker, though he has been told by the maker that he has paid the note. The law does not impose on the attorney the determination of any such case; nor will it hold him guilty of a dereliction of duty, or trespass on the rights of others, if he determine to act, and does act, in accordance with the statement of his client and constituent. Such, I understand, is the case made by the evidence against the defendant Hogan. As to the bank, its responsibility is made out through the alleged fault of its president and servant. As I read the evidence in the case, the utmost that can be said in regard to his relation to the note sued on is that it was left in doubt whether the bank had the right to recover on the note or not. Under such circumstances, when he directed the suit to be brought, he was acting in the line of his duty, and was conducting himself as a faithful servant should have acted. Of such conduct neither malice nor want of probable cause can be predicated.

SUPREME COURT OF CALIFORNIA.

2 Cal. Unrep. 407

PELLIER v. GILLESPIE and others. (No. 7,790.)

Filed November 22, 1884.

1. SERVICE OF PROCESS—FORM OF AFFIDAVIT.

An affidavit of service of summons is not fatally defective because it does not state that the parties on whom it was served were residents of the county where served. If it states that they were served in that county, it will be presumed, nothing to the contrary appearing, that they resided in the county in which they were served with process.

2. MORTGAGE—FORECLOSURE—ALLEGATIONS.

An allegation that a purchaser of mortgaged property covenanted and agreed to pay the mortgage debt and discharge the mortgage lien is sufficient to sustain the judgment of foreclosure and sale.

Department 2. Appeal from the superior court of Santa Clara county.

This was a proceeding to foreclose the plaintiff's mortgage on defendant Gillespie's premises. The complaint alleged sale by Gillespie to the defendant the San Jose I. M. & L. Co., and that said company had covenanted and agreed with Gillespie to pay the mortgage debt and discharge the mortgage lien. The court rendered a judgment of foreclosure and decree of sale. The defendant San Jose I. M. & L. Co. appealed.

Houghton & Stetson, for appellant.

J. R. Lowe, for respondent.

BY THE COURT. The objection that the affidavit of service of summons is fatally defective because it does not state that the appellant, on whom the summons alone was served, and the defendant, on whom a copy of the complaint was served with the summons, were residents of the same county, is overruled, on the authority of *Calderwood v. Brooks*, 28 Cal. 153. The allegation that appellant covenanted and agreed to pay the mortgage debt and discharge the mortgage lien is sufficient to sustain the judgment. There is a sufficient description of the premises. Judgment affirmed.

v.4,no.27—72

66 Cal. 122

GARLICK v. BOWERS. (No. 9,601.)

Filed November 22, 1884.

1. EVIDENCE—SALE—STATEMENTS OF VENDOR.

Evidence of statements made by the vendor after a sale and delivery of property is hearsay, and not admissible as part of the *res gestæ*.

2. JURY—INSTRUCTIONS.

It is sufficient ground for the refusal of instructions asked that they could not have been given without modification.

3. SALE—DELIVERY, WHAT CONSTITUTES.

Williams v. Lerch, 56 Cal. 334, deciding what constitutes an immediate delivery and actual and continued change of possession, affirmed.

Department 2. Appeal from the superior court of Kern county.

S. S. Hall and *Zue G. Peck*, for appellant.

Freeman & Arick, for respondent.

By THE COURT. Evidence of statements made by the vendor after he had sold the property was clearly inadmissible. *Paige v. O'Neil*, 12 Cal. 496; *Fisher v. Webster*, 13 Cal. 58; *Cohn v. Mulford*, 15 Cal. 50; *Jones v. Morse*, 36 Cal. 205; *Whitney v. Durkin*, 48 Cal. 462; *Hutchings v. Castle*, Id. 153. The plaintiff had introduced evidence which, if true, showed that the property had been sold and delivered to her before the vendor made the statements which were testified to by defendant's witnesses against the objection of the plaintiff. Under such circumstances the statements of the vendor could not be regarded as a part of the *res gestæ*. Evidence of what he said after the sale and delivery of the property to the plaintiff was simply hearsay. For this error the plaintiff is entitled to a new trial. The plaintiff requested the court to give several instructions which were not given. We think none of them should have been given without modification, and that of itself constituted sufficient ground for the refusal. We think there is no error in the instructions given by the court. In *Williams v. Lerch*, 56 Cal. 334, the question of what would constitute an immediate delivery, and an actual and continued change of possession, is quite fully considered, and we do not deem it necessary to add anything to what is there said on the subject. Judgment and order reversed.

HILL v. WALL. (No. 9,510.)

Filed November 24, 1884.

GUARDIAN'S SALE—ORDER FOR SALE OF LAND—SUFFICIENCY OF DESCRIPTION.

An order of court for sale of land must be in itself sufficient, without reference to an extraneous matter, and where the description of the land is insufficient the sale will be invalid. The description in an order of sale of "twenty and one-half acres of the *rancho* La Golita, being the share of a tract of thirty-one acres allotted to said minors by a decree of the district court of Santa Barbara county in a suit in partition wherein the guardian herein and mother of said minors was plaintiff, and said minors were defendants," does not describe the land to be sold with sufficient certainty. McKee, J., dissenting.

In bank. Appeal from the superior court of Santa Barbara county.

B. F. Thomas, for appellant.

W. C. Stratton, for respondent.

MORRISON, C. J. Plaintiff brought ejectment in the superior court of Santa Barbara county for the recovery of a portion of the *rancho* La Patera y La Golita, particularly described in the complaint. Defendant had judgment. Plaintiff moved for a new trial, which was denied; and the appeal is from the judgment, as well as from the order of the court denying a new trial. On the hearing of the motion for a new trial it was stipulated "that the land sold to defendant's grantor, at the guardian sale, was the land of the plaintiff and his brother, Thomas Hill." This was the land in controversy. It was further agreed that the stipulation might be incorporated in plaintiff's statement on motion for a new trial, and on appeal to the supreme court. By the foregoing stipulation it was admitted that plaintiff and his brother were the owners of the land in controversy at some time anterior to the making of the stipulation, and plaintiff's right of recovery was a consequence of such stipulation, unless defendant proved title out of the plaintiff at the time the action was brought. This he attempted to do by the introduction in evidence of certain proceedings in the probate court. These proceedings consisted of an order of the probate court of Ventura county, bearing date February 5, 1875, appointing Maria Los Angeles Burke de Hill guardian of Juan B. Hill (the plaintiff) and his infant brother, Thomas M. Hill. The petition for letters of guardianship was filed in the probate court of Santa Barbara county,—the place of residence of the minors,—and was transferred from that county to the county of Ventura, for the reason, as the order states, that the judge of the former county was disqualified to act in the matter. Plaintiff objected to the introduction in evidence of the letters of guardianship, on the ground that the probate court had no jurisdiction to make the order, and on the further ground that it was not shown that the notice required by law had been given.

The next step in the order of defendant's proof was a petition by said guardian for the sale of the lands of the two wards to raise

money for their support and education. On the fourteenth day of June, 1875, the probate court of Ventura county, by its order, authorized the guardian of the wards to sell all the right, title, and interest of her wards in and to the following real estate: "Twenty and one-half acres of the *rancho* La Golita, being the share of a tract of thirty-one acres allotted to said minors by a decree of the district court of Santa Barbara county in a suit in partition wherein the guardian herein and the mother of said minors was plaintiff, and said minors were defendants."

The defendant then offered in evidence an order of the probate court of Ventura county, dated January 31, 1876, reciting a sale of said lands to one G. H. Lillard, confirming the sale, and ordering the execution to him of the proper legal conveyance to pass the title to the land sold. Defendant then offered in evidence a deed from said guardian to G. H. Lillard, dated the eleventh day of February, 1876, conveying to him all the right, title, and interest of said minor children to the land in controversy, and also a deed from said Lillard to defendant for the same property, bearing date October 26, 1876. In rebuttal, the plaintiff offered in evidence a petition and subsequent order of the probate court of Santa Barbara county, dated the eleventh day of December, 1876, appointing Rabela Hill, the grandmother of said children, their guardian. Plaintiff also offered in evidence the order of the probate court of Ventura county fixing a time for the hearing of the petition of the guardian for the sale of said lands, and ordering that a notice of such application be given for three successive weeks next before the hearing of said application, in the *Santa Barbara Index*, a newspaper published in the county. Defendant objected to the evidence, and the objection was sustained. The plaintiff then offered in evidence the affidavit of the printer of the newspaper to prove that the required notice was not published for three successive weeks next before the hearing of the application. To the introduction of this affidavit in evidence objection was made, on the ground "that the recital in the order of the court authorizing the sale, that due publication of such notice had been given, was conclusive of the fact of publication," and thereupon objection was sustained to all inquiry in regard to the fact of publication.

The appellant assigns numerous grounds of error, but it will be sufficient for the purposes of this appeal to notice one of them, as it is decisive of the case. This point relates to the sufficiency of the order of sale, and that point, we think, is well taken. The order does not describe the land to be sold with sufficient certainty. The description found in the order of sale is of "twenty and one-half acres of the *rancho* La Golita, being the share of a tract of thirty-one acres allotted to said minors by a decree of the district court of Santa Barbara county, in a suit in partition wherein the guardian herein and mother of said minors was plaintiff, and said minors were defendants."

The order of sale must be in itself sufficient; and to make it so, the description of the land to be sold must be sufficiently definite and certain, without reference to any extraneous matter. Section 1544, Code Civil Proc., provides that the order of sale must describe the lands to be sold, and the record cannot be helped out by reference to a document not found in it. This question was fully considered by this court in the case of *Crosby v. Dowd*, 61 Cal. 557, and the reasoning in that case applies to the one now in hand. Judgment and order reversed, and cause remanded for a new trial.

We concur: SHARPSTEIN, J.; MCKINSTRY, J.; MYRICK, J.; ROSS, J.; THORNTON, J.

MCKEE, J., *dissenting*. I dissent. The controlling question in the case relates to the jurisdiction of the probate court of Ventura county to order a sale of the land in controversy as the estate of Juan R. and Thomas W. Hill, who were minors and wards of the court. Assuming that the guardian of the minors had been properly appointed, that she filed a petition according to law for a sale of the estate of the wards, and that the court in Ventura county had jurisdiction to hear the same, it was objected that the action by the court in ordering a sale was void, because neither the petition nor order of sale contained a sufficient description of the land. The objection was overruled, and the ruling is assigned as error. In fact, the petition contained the following description of the land, viz.:

"Said real estate is all situated on the *rancho* La Golita, in the county of Santa Barbara, in this state, and is described as follows, to-wit: The first piece or parcel, and the same which guardian, your petitioner, desires an order to sell, contains $20\frac{1}{2}$ acres allotted to said minors in a partition suit had in the district court of the county of Santa Barbara, wherein your petitioner was plaintiff and said minors defendants; for a further and more particular description of which see inventory and appraisalment on file herein."

Reference to the inventory and appraisalment shows the land described as follows, viz.:

"A certain piece or parcel of land situate, lying, and being on *rancho* La Golita, in the county of Santa Barbara, in this state, containing twenty and a half acres, being the share of a tract of thirty-one acres allotted to said minors by a decree of the district court of Santa Barbara county, in a suit of partition wherein the guardian herein and mother of said minors was plaintiff, and said minors defendants, and bounded and described as follows: Commencing at post No. 44; thence running N. 7.56 chains to post No. 42; thence N. 85 deg. W. 41 chains to post No. 33; thence S. 7.56 to post No. 32; thence S. 85 deg. E. 41 chains to the place of beginning,—containing thirty-one (31) acres, and marked on said map as 'Heirs of J. J. Hill, 5.'"

The order of sale recites that—

"Said minors have no other property than the real estate described in said petition; * * * that it is necessary and beneficial that a portion of said real estate be sold, for the reason that the proceeds of such a sale is necessary for the maintenance and education of said wards, and as no good reason exists why the order of sale should not be granted as prayed in said petition;

* * * therefore the guardian is authorized to sell all the right, title, and interest of her said wards in the following real estate situated in the county of Santa Barbara, and bounded and described as twenty and one-half acres on *rancho La Golita*, being the share of a tract of thirty-one acres allotted to said minors by a decree of the district court of Santa Barbara county, in a suit of partition wherein the guardian herein and mother of said minors was plaintiff, and said minors defendants.

"Dated June 14, 1875."

Under these proceedings the property was sold, the purchase money paid to the guardian, confirmation of the sale was duly made, and a deed executed and delivered to the purchaser, under which he entered upon the land and has had possession since. But his title thus acquired is assailed because it is said the probate court that ordered the sale of the land and confirmed the same, acquired no jurisdiction to make the order or confirmation, because of the defective description of the land in the proceedings. Unquestionably the probate court must have had jurisdiction of the land affected by the order of sale, otherwise the order would be a nullity. But the record sufficiently discloses that the court acquired jurisdiction over the cause, over the parties, and over the land, and that was all that was necessary to give validity to its order. Section 1917, Code Civil Proc. Admit that the description of the land in the record was defective or inaccurate as a matter of pleading, and that the defect or inaccuracy was carried into the order of sale, the order was not thereby rendered void in the sense that it was assailable in a collateral attack. Having been rendered by a court of competent and exclusive jurisdiction, in a proceeding of which it had jurisdiction, the order is not assailable collaterally for a merely defective or inaccurate description of the subject-matter of the order.

Certum est quod certum reddi potest is a rule of logic as well as of law for solving any incertitude in expressions of time or descriptions of land. "It is," says Broom, Leg. Max. 600, "peculiarly applicable to written instruments, such as feoffments, grants, wills, leases, contracts," etc. Hence the general rule that any description of land in a deed by which the land may be identified by a county surveyor, or with reasonable certainty, either with or without the aid of extrinsic evidence, is sufficient. *Smiley v. Fries*, 104 Ill. 416. The rule is not limited in its application to deeds. Says the supreme court of Alabama:

"The same rule should be applied when a decree is assailed because of an inaccurate or imperfect description of the lands. If inaccuracy or imperfection of description of the lands could be held to vitiate the proceedings, then the inquiry would at once arise, what degree of inaccuracy will subject them to condemnation? How gross must it be, or what imperfections are so slight, that they may be disregarded? When will validity or invalidity be imputed? Vagueness of description or mistakes, so that lands are entirely misdescribed, do not avoid a deed or grant. * * * Parol evidence is received to identify the lands intended to be described. Indefiniteness and discrepancies in the description of lands in the petition, order of sale, report of sale, and convey-

ance of title, it has been expressly decided, do not invalidate the sale, and parol evidence is admissible to fix the boundaries of the lands ordered to be sold." *Wright's Heirs v. Ware*, 50 Ala. 559.

And the same court, in the case of *Smitha v. Flournoy*, 47 Ala. 360, says:

"The application in the case avers all the facts required by the Code, and the description of the land, if not perfectly accurate, is accurate as far as it goes. It would be sufficient in a deed and in a will. * * * Such a description is sufficient to bring the subject within the jurisdiction of the court. * * * It entitled the court to proceed. This was all that was needed to give validity to its judgment."

Commissioners v. Crawford, 3 Wall. 396.

So, in *Alexander v. Knox*, 6 Sawy. 54, which was an action of ejectment by one who derived title from a purchaser at a foreclosure sale to recover possession of a half section of land known as claim No. 70, lying in sections 35 and 36, in township 20 S., of range 3 W. of the Wallamet meridian. The decree of foreclosure described the land as "Claim No. 70, in T. 20 S., R. 3 W. of the Wallamet meridian." The court, by the aid of extrinsic evidence in taking judicial notice of public surveys under an act of congress, held that the description was just as certain as a description by reference to the sections in the township and range. See, also, *Wright's Heirs v. Ware*, *supra*. In *Crosby v. Dowd* this court held that a description of mortgaged premises was absolutely void; but in this case, I think, the description of the land in the petition and order of sale was sufficient to sustain the sale when collaterally attacked:

66 Cal. 129

BOYLE v. HITCHCOCK. (No. 7,982.)

Filed November 24, 1884.

STREET ASSESSMENT—APPEAL TO BOARD OF SUPERVISORS.

A person subject to street assessment in the city and county of San Francisco, who feels himself aggrieved thereby, may appeal to the board of supervisors, and a failure to so appeal waives an objection to the amount of such assessment.

Department 2. Appeal from the superior court of the city and county of San Francisco.

Wright & Wright, for appellant.

J. M. Wood, for respondent.

BY THE COURT. We are of opinion that the objection to the assessment in this case, that it included an amount as incidental expenses for engineering and printing, was waived by a failure to appeal to the board of supervisors. Section 12 of the act of 1872, St. 1871-72, p. 815. We are also of the opinion that the resolution

of intention sufficiently described the work which the board of supervisors desired to have done. Judgment and order denying a new trial affirmed.

McVERRY v. HITCHCOCK. (No. 7,981.)

Filed November 24, 1884.

JUDGMENT AFFIRMED.

Department 2. Appeal from the superior court of the city and county of San Francisco.

Wright & Wright, for appellant.

J. M. Wood, for respondent.

By THE COURT. We find no error in the record, and the judgment and order are affirmed.

66 Cal. 668

PEOPLE v. CUNNINGHAM. (No. 20,002.)

Filed November 25, 1884.

1. CRIMINAL LAW AND PROCEDURE — LARCENY — EVIDENCE — PROOF OF OTHER OFFENSES.

Upon the trial of a person charged with larceny, the evidence must be confined to the offense charged, and it is error to admit evidence to be introduced tending to show that the accused had at the same time stolen other articles than those charged in the information.

2. SAME — EVIDENCE — SHORT-HAND NOTES OF TESTIMONY.

Testimony of a witness taken on the preliminary examination in a criminal case, if written out, certified, and filed by the reporter, is admissible as a deposition in case of the death of the witness before the trial; and only in case of its loss or destruction will secondary evidence of its contents be admissible. The reporter's notes in short-hand of such testimony are not competent evidence.

Department 2. Appeal from the superior court of the county of Santa Clara.

T. H. Laine, for appellant.

The Attorney General, for respondent.

THORNTON, J. The defendant was accused, tried, and convicted of the crime of grand larceny, in stealing, on the eighteenth of May, 1883, five head of cattle, the property of one John Trimble. It is urged that several errors were committed on the trial, on account of which the conviction ought not to be permitted to stand.

1. When the defendant was arrested, there was found in his possession a steer belonging to Charles Wade, which was not referred to in the information. In relation to this steer the following occurred

on the trial: Charles Wade was called as a witness in rebuttal for the people, and testified that on the twentieth or twenty-first of May, 1883, he got from Trimble's pasture a red and white steer. The district attorney, at the instance of the court, stated his reasons for offering the testimony which he was about to introduce, as follows:

"The defense in this case is that the defendant purchased the cattle, which have Mr. Trimble's brand, from the man who had charge of them, Carmel. This testimony is offered as tending to show that the story is improbable, because he took not only the cattle which had Mr. Trimble's brand, but another animal which did not belong to Mr. Trimble, whose brand the defendant, from his own testimony, is well acquainted with, and that of another owner, at the same time. I understand that the taking of different articles at the same time is always admissible, as tending to show the intent with which the animals were taken."

The defendant objected:

"*First.* If this testimony is offered for the purpose indicated, it was a part of the state's original case, and should have been then offered, and not in rebuttal. It rebuts nothing offered by us. *Second.* It is not within the charge. The defendant is not charged with taking any but the Trimble cattle. It is therefore incompetent and inadmissible."

These objections were overruled by the court, and an exception was reserved. The witness Wade then proceeded to testify as follows:

"This red steer was mine, branded with my brand, and had my ear-marks. I never sold that steer, nor authorized any one else to sell him. He was sent out there in that range the first of March, 1883, and I saw him between Dougherty's and Carmel's about the first of May; was between the fifteenth of April and the first of May."

The court, in its directions to the jury, stated the reasons which induced it to admit the testimony as follows:

"This evidence was not admitted as tending to prove that he [referring to defendant] had stolen Wade's steer, as charging him with the guilt of that offense, or as seeking any conviction of him here on that ground, but simply as making it more or less probable or improbable that his explanation that he acquired honestly the other animals was founded in truth, by showing that at the same time he had in his possession property taken by other thefts at the same time."

Then, after giving an illustration as tending to show the relevancy and bearing of the evidence, this further was said as the reason why the testimony was let in: that, "stated plainly and simply, that if he took the Wade steer and drove it off, it was more probable that he was stealing the Trimble cattle and taking them off, and that the explanation that he bought them from Carmel, supposing that he had a right to sell them, was not a truthful explanation." By the foregoing, in our judgment, the jury were informed that the evidence as to the Wade steer was let in for their consideration that they might find whether defendant stole this steer or not, and if they did so find, such conclusion would render it more likely to be true that he had stolen the Trimble cattle; in other words, that if they found that he

had stolen the Wade steer, of which he was not accused in the information, it was a circumstance from which they might infer a larceny of the Trimble cattle with which he was charged in the information.

In admitting the evidence objected to, we are of opinion that the court below fell into an error. A person cannot be accused of one offense and tried for another. The indictment or information must charge but one offense, (Penal Code, § 954,) and it must contain a statement of the acts constituting the offense in ordinary and concise language, in such manner as to enable a person of common understanding to know what is intended. Penal Code, § 950. The object of these provisions is to present a distinct issue for trial, and clearly inform a defendant of that with which he is charged, that he may prepare to meet it. The evidence should therefore be confined to the offense charged, otherwise the party on trial might be taken by surprise. It was well said by the general court of Virginia, speaking by BROCKENBURGH, J., on this point:

"As he [the defendant] is charged with a particular offense, he has notice to be prepared to defend himself against that charge and that alone; he cannot be prepared to defend himself against other charges not exhibited against him, or to maintain the integrity of his whole life when that is not put in issue." *Walker's Case*, 1 Leigh, 574.

The principles just above referred to were violated in the ruling in this case. The evidence as to the Wade steer should have been excluded from the jury. The conclusion here reached is supported by the decisions of this court in *People v. Hartman*, 62 Cal. 562, and *People v. Wood*, 12 Pac. C. Law J. 146.

2. The prosecution offered in evidence the reporter's notes, in shorthand, of the testimony of Ernest L. Fischer, taken on the preliminary examination of the defendant, offering at the same time to prove the correctness of the notes by the reporter, who was present. Fischer had died intermediate the preliminary examination and the trial, which was admitted by defendant's counsel; and it was further admitted that defendant was present with his counsel at such examination, and that his counsel then and there cross-examined Fischer in defendant's presence, and that the reporter would testify that his notes correctly represented Fischer's testimony on that occasion. To the introduction of this testimony the defendant objected on the grounds that it was incompetent and inadmissible; that in a criminal prosecution the defendant must be confronted with the witness, and depositions cannot be read except in certain specified cases, of which this is not one; that the testimony of a deceased witness taken or given on a preliminary examination cannot be used in a criminal case; that such examination is not a former action within the meaning of the statute. The court ruled against these objections, and admitted the evidence, to which an exception was reserved by defendant.

If the testimony of Fischer, given on the preliminary examination, had been taken, written out, certified, and filed by the reporter, as

provided by section 869 of the Penal Code, it would have been admissible as a deposition in the case of the death of the witness before the trial, as provided in section 686 of the same Code. We recently held such a deposition admissible in *People v. Oiler*, 4 PAC. REP. 1066, where the witness had left the state after his testimony was taken and prior to the trial. But we are of opinion that the written deposition is alone admissible, unless in case of its loss or destruction, when secondary evidence of its contents may be given. The object of the provisions of the sections of the Penal Code above cited (686 and 869) was to have the testimony on preliminary examinations so taken that it might be preserved as given for use or reference at a time subsequent to that at which it was taken, and that, if it became necessary to use such testimony on a trial, the written deposition, taken and certified as required by law, should alone be used for such purpose, and that resort should not be had to the memory of those who heard it. We are, therefore, of opinion that the court fell into an error in allowing the above-mentioned evidence of Fischer's testimony to go to the jury. We find no other error in the record; but for those above mentioned the judgment and order denying defendant's motion for a new trial are reversed, and the cause remanded for a new trial.

We concur: MYRICK, J.; SHARPSTEIN, J.

66 Cal. 161

HOBBS v. AMADOR & SACRAMENTO CANAL Co. and others. (No. 9,060.)

Filed November 26, 1884.

1. CORPORATION—INJUNCTION—UNLAWFUL ACTS.

A corporation may not, in transacting its general and ordinary business, do unlawful acts; and acts which threaten to destroy or injure another's property are unlawful, and enjoined at the suit of the person injured, though the acts enjoined are necessary to the carrying on of defendant's business.

2. MINING CLAIM—LAWFUL USE OF, WHAT IS.

A party is entitled to use his mining claim in a lawful manner. No manner is lawful which precludes another from the enjoyment of his rights. No one has a right, directly or indirectly, to cover his neighbor's land with mining debris, sand, and gravel, and other material, so as to render it valueless.

3. CORPORATION—TEMPORARY INJUNCTION AGAINST UNLAWFUL ACTS—NOTICE.

The law does not require notice of an application to restrain a corporation from committing unlawful acts injurious to the applicant. The statute (Code Civil Proc. 531) applies only to lawful acts done in the usual and ordinary course of business.

4. APPEAL—MODIFICATION OF PRELIMINARY INJUNCTION—JUDICIAL DISCRETION.

The court that grants a preliminary injunction may, in the exercise of its judicial discretion, modify the same at any time before the case terminates in a final judgment, and the order of modification will not be disturbed unless there has been an abuse of discretion.

In bank. Appeal from the superior court of Sacramento county.
Cal.Rep. 1-4 P.—62

Geo. Cadwalader, for appellant.

Freeman & Bates, for respondent.

McKEE, J. In this case there are two appeals: one from an order denying a motion to dissolve a temporary injunction, and another from an order modifying the injunction. Upon affidavits tending to show that the injunction had been issued without notice to the defendant, and that it was an injunction which suspended the general and ordinary business of the defendant as a corporation, the court denied the motion to dissolve, and that ruling is assigned as error. The injunction was issued to restrain the defendant from continuing to dump its mining *debris*, tailings, and other refuse matter from its mines into certain water-courses, which washed the *debris* and material down upon and spread them over the plaintiff's land, rendering it valueless for agricultural or other purposes.

1. It is no part of the general and ordinary business of a corporation to do unlawful acts. Acts which are of a continuous nature, and threaten to destroy or irreparably injure the property of another, are unlawful, and enjoinable, at the suit of the person injured, not upon the ground of interfering with a lawful business, but upon the ground that every person is entitled to the protection of the law in the use and enjoyment of his property. But it is claimed that the doing of the acts restrained by the injunction are necessary to the successful carrying on of the business in which the defendant is engaged, and that, if the defendant be enjoined from carrying on its business in that way, hydraulic mining cannot be carried on at all. Yet the acts restrained are none the less unlawful, if they are injurious to the private rights of others, and the defendant is bound by law to so conduct its business as that it shall not be derogatory to the private rights of other property owners. In mining pursuits, as was said in *Logan v. Driscoll*, 19 Cal. 623, "defendant is entitled to use his mining claim in a lawful manner; but no manner can be considered lawful which precludes the plaintiff from the enjoyment of his rights." No person, natural or artificial, has a right, directly or indirectly, to cover his neighbor's land with mining *debris*, sand, and gravel, or other material, so as to render it valueless. *Robinson v. Black Diamond Coal Min. Co.* 57 Cal. 412; *Potter v. Froment*, 47 Cal. 465; *Richardson v. Kier*, 34 Cal. 63; *Courtwright v. Bear River Ditch Co.* 30 Cal. 573.

2. The law does not require notice of an application for a temporary injunction to restrain a corporation from committing unlawful acts injurious to the applicant. Section 531, Code Civil Proc., has reference only to lawful acts performed in the course of its general and ordinary business. A preliminary injunction granted against a corporation to restrain it from conducting its business in an unlawful manner, is, therefore, not void, though granted without notice. *Golden Gate Hydraulic M. Co. v. Superior Court*, 3 PAC. REP. 628.

3. The court that grants a preliminary injunction may, in the ex-

ercise of its judicial discretion, modify the same at any time before the case terminates in a final judgment; and the order of modification will not be disturbed unless there has been an abuse of discretion. Nothing of that character appears in the record before us. The orders appealed from are affirmed.

We concur: ROSS, J.; MCKINSTRY, J.; SHARPSTEIN, J.; MYRICK, J.; MORRISON, C. J.

66 Cal. 136

KIMPLE v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO. (No. 9,604.)

Filed November 25, 1884.

CERTIORARI—REMEDY BARRED BY LAPSE OF ONE YEAR.

The remedy by writ of *certiorari* is barred by the lapse of one year, unless circumstances of an extraordinary character have intervened to justify a longer delay in applying for the writ.

Department 2. Application for writ of *certiorari*.

D. L. Smoot and A. M. Heslip, for appellant.

W. R. Daingerfield, for respondent.

THORNTON, J. In the case of *Conway v. Conway*, which was an action for a divorce, a decree was entered on the twenty-first of September, 1878, granting one of the parties a divorce and ordering a sale of the community property. Under this decree the community property was sold by the sheriff and the petitioner became the purchaser. The purchase money was paid to the sheriff by the petitioner, and after the lapse of a proper period the sheriff executed a deed of the property to the purchaser. The possession of the property was withheld by Margaret Conway, the plaintiff in the action above mentioned, from the purchaser, and on motion of the purchaser a writ of assistance was on the twenty-eighth of February, 1880, ordered by the court, under which she was put in possession. This writ was granted by the superior court of the city and county of San Francisco. After the writ was executed it was duly returned and filed with the papers in the cause. Afterwards, on the twenty-eighth of July, 1882, the above-mentioned Margaret Conway procured from the said superior court an order vacating the writ of assistance formerly granted, and ordering said Margaret to be restored to the possession of the property above referred to. The application before us in this case is for a writ of *certiorari* to review and annul the last-mentioned order of the twenty-eighth of July, 1882. The application for this writ was made on the fifth day of June, 1884, nearly two years after the entry of the order sought to be annulled.

It is contended on behalf of respondent that the application comes

too late. It was so held under a like state of facts in *Keys v. Marin Co.* 42 Cal. 252. In that case, as in this, nearly two years had elapsed after the entry of the order complained of before an application was made for the writ. The court, in relation to this, said:

"An appeal to the court from a final judgment of a district court is barred by the lapse of one year, and we are of opinion that unless circumstances of an extraordinary character be shown to have intervened, the remedy through a writ of *certiorari* should be held to be barred by the lapse of a like period of time." 42 Cal. 256.

In the case before us the order sought to be annulled might have been appealed from in 60 days after it was entered, (Code Civil Proc. § 939,) and an appeal from a final judgment in the court granting the order might have been taken within one year after said judgment was entered. No circumstances of any kind are made to appear in this case justifying the delay in applying for the writ of review. The like reasons for denying the writ exist in this case as in *Keys v. Marin Co.*, and approving the ruling in that case we hold here that on the facts stated in the petition the writ must be denied.

We concur: SHARPSTEIN, J.; MYRICK, J.

66 Cal. 155

PEOPLE v. GOLD RUN DITCH & MINING Co. (No. 8,834.)

Filed November 25, 1884.

PRACTICE—INJUNCTION—FINAL JUDGMENT—EFFECT OF CONDITIONS.

It is not the duty of a court to make provision in its final judgment for a re-opening or renewal of a controversy which it closes by its judgment. Therefore, where it was adjudged that a plaintiff was entitled to a perpetual injunction restraining certain acts of defendant which amounted to a nuisance, it was erroneous for the court to provide in its judgment for the annulling and setting aside of the decree when it should appear that defendant had provided means for abating such nuisance. ROSS, SHARPSTEIN, and MCKINSTRY, JJ., dissenting.

In bank. Appeal from the superior court of the city and county of San Francisco.

The Attorney General, Geo. Cadwalader, A. S. Rhodes, and I. S. Belcher, for appellant.

W. C. Belcher, J. K. Byrne, W. T. Wallace, and S. M. Wilson, for respondent.

MCKEE, J. This is a counter-appeal from the last clause in the judgment entered in this case. As we held on the appeal of the defendant, the plaintiff was entitled, upon the finding of facts, to a perpetual injunction to compel the discontinuance of the acts complained of. The law gave it, and the court awarded it; but it made the judgment by which it awarded the perpetual injunction subject to this condition, viz.:

"The said defendant may at any time, as it may be advised, apply to this court to have this decree and restraining order modified or vacated, and set aside. And whenever, upon such showing, it shall appear that efficient means have been provided to impound, detain, and hold back such tailings at any point on said American river above Alder creek, and that such means are sufficient to detain all boulders, cobble-stones, gravel, and the heavier sand, then said defendant shall be entitled to have said decree vacated and set aside."

We think this was erroneous; for the plaintiff was entitled to a final judgment absolutely or it was not. The court adjudged that it was entitled to a perpetual injunction, and that adjudication definitively settled the rights and relations of the parties to the controversy as to the matters in litigation between them. By the judgment it was finally determined that certain acts, as performed by the defendant, and threatened to be continued at the commencement of the action, amounted to a public nuisance, which must be forever enjoined. The rights thus finally determined could not be subjected to be disturbed or changed, annulled or set aside, upon the performance by the defendant of new and independent acts at some near or remote period in the future. It is not the duty of a court to make provision in its final judgment for a reopening or renewal of a controversy which it closes by its judgment. *Reipublice ut sit finis litum*. As is said in Joyce on Injunctions, vol. 1, p. 107:

"Where a plaintiff has proved his right to an injunction against a nuisance or other injury, it is no part of the duty of the court to inquire in what way the defendant can best remove it, and the plaintiff is entitled to an injunction at once, unless the removal of the injury is physically impossible; and it is the duty of the defendant to find his own way out of the difficulty, whatever inconvenience or expense it may put him to."

See, also, *Attorney General v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. App. 146.

Besides, while the plaintiff was entitled, as matter of right, to a perpetual injunction pure and simple, the provision inserted in the judgment to that effect in favor of the defendant is of no benefit to the defendant; for if it be possible to permanently impound the debris, etc., which the court perpetually enjoins it from dumping into the American river, the defendant has the right to adopt such means as may be within its power for that purpose; and the right to do so exists independent of the judgment, and may be exercised at all times, without reference to it. The perpetual injunction does not restrain the defendant from conducting its business in a lawful manner, and any means adopted to that end are lawful. That part of the judgment appealed from is therefore reversed.

We concur: MYRICK, J.; MORRISON, J.; THORNTON, J.

ROSS, SHARPSTEIN, and MCKINSTRY, JJ., *dissenting*. Inasmuch as, in our opinion, the decree as entered in the court below should be affirmed, we dissent from the above judgment.

66 Cal. 157

DUNNE v. DUNNE. (No. 7,763.)

Filed November 26, 1884.

JUDGMENT AFFIRMED.

On authority of the judgment rendered in department, (4 PAC. REP. 441,) judgment affirmed.

In bank. Appeal from the superior court of Santa Clara county.
McKissick & Rankin, for appellant.

Wm. Matthews, for respondent.

By THE COURT. This appeal was heard in department 1 of this court, and an opinion filed therein July 25, 1884. 4 PAC. REP. 441. Subsequently, a hearing by the court in bank was granted. Such hearing has been had. We are satisfied with the judgment given in department, and with the reasons therefor. The judgment of the court below is therefore affirmed, except as to interest. The cause is remanded, with instructions to modify the judgment by computing interest in accordance with the opinion of the department.

PAIGE v. ROCKY FORD CANAL & IRRIGATION Co. (No. 9,396.)

Filed November 26, 1884.

FINDINGS—JUDGMENT REVERSED.

Findings held not to sustain the judgment.

In bank. Appeal from the superior court of Tulare county.

Brown & Daggett, for appellant.

Atwell & Bradley, for respondent.

By THE COURT. The findings are too indefinite and uncertain to sustain the judgment. Judgment and order reversed, and cause remanded for a new trial.

66 Cal. 138

PEOPLE v. GOLD RUN DITCH & MINING Co. (No. 8,996.)

Filed November 25, 1884.

1. NAVIGABLE RIVER—HYDRAULIC MINING—PUBLIC NUISANCE—INJUNCTION.

The owner of hydraulic mines, situate on the banks of an unnavigable stream which empties its waters into a navigable river within the state, has no right to dump its hydraulic *debris* into the stream, to the endangerment of habitation and cultivation of large tracts of country, upon which are cities, towns, and villages, and to the impairment of the navigation of such river. Acts of this nature constitute a public nuisance, which may be enjoined in an action in the

name of the people of the state, although other mining companies, acting separately and independently of each other, contributed in producing such nuisance.

2. COURTS—JUDICIAL NOTICE—NAVIGABILITY OF STREAM.

Courts take judicial notice of the navigability of the Sacramento river.

3. NAVIGABLE STREAM—PUBLIC HIGHWAY—NUISANCE.

A navigable river is a great public highway governed by the same general rules applicable to highways upon land, and in them the people of the state have controlling and paramount rights, and all unauthorized intrusions upon a water highway for purposes unconnected with the rights of navigation or passage are nuisances.

4. JOINDER OF PARTIES—NUISANCE.

In a proceeding to abate a nuisance, public or private, persons committing the acts constituting the nuisance may be enjoined, either jointly or severally.

5. CUSTOM AND PRESCRIPTION—RIGHT TO CONTINUE NUISANCE NOT ACQUIRED BY.

The right to continue a public nuisance cannot be acquired by custom or prescription.

In bank. Appeal from the superior court of the county of Sacramento.

Jas. K. Byrne, W. C. Belcher, S. M. Wilson, Wm. T. Wallace, and Stewart & Herrin, for appellant.

The Attorney General, Geo. Cadwalader, A. L. Rhodes, I. S. Belcher, and Richd. Bayne, for respondent.

McKEE, J. This appeal is from an order denying a motion for a new trial, and from a judgment which perpetually restrains the commission and compels the discontinuance of certain acts as wrongful and injurious to public rights. The record of the case shows that "the Gold Run Ditch & Mining Company has been, since August, 1870, a corporation, existing under the laws of the state of California, for the purpose of mining by the hydraulic process, and selling water to miners and others; and that it is now, and its predecessors have been for several years last past, in possession of five hundred acres of mineral land, situated adjacent to the north fork of the American river, and of certain mines on said land, which it works by the hydraulic process. The natural surface of this land lies about one thousand feet above the river; and all the material of the mines upon the land—consisting of about twenty million cubic yards of material, composed mostly of sand, gravel, small stones, cobbles, and bowlders, mixed with small particles of gold,—is capable of being worked off into the river. For the purpose of mining this tract of land by the hydraulic process, the company has conducted to its mines, by means of ditches and iron pipes, a large quantity of water, which it uses, and will continue to use, under a vertical pressure of several hundred feet, discharging water through 'Little Giants' and 'Monitors,' and dumping all the tailings from its mines into the river. In that manner it has been carrying on its mining operations upon said land for about eight years last past; and up to the time of commencing this action, and during about five months of each year of said period, has been daily discharging into the said river between four and five thousand cubic yards of solid material from its said mine, to-wit, of

bowlders, cobbles, gravel, and sand, making a yearly discharge of at least six hundred thousand cubic yards, and will continue to discharge that quantity annually if the working of said mine be permitted to continue, and at such rate it will require some thirty years to mine out and exhaust said mineral land."

Of the material thus discharged into the river a large portion has been washed, from the place of discharge or dump, down the river, and, "commingled with tailings from other hydraulic mines, and still other material which is the product of natural erosion, has been deposited in the beds and channels of the American and Sacramento rivers and their confluents, but mostly in the American, and upon lands adjacent to both rivers." The deposits of this material upon the beds and along the channels of the rivers, and through the Suisun bay, and into the San Pablo and San Francisco bays, have already filled and raised the beds of both rivers. The bed of the American has been raised from 10 to 12 feet and in some places more, and the bed of the Sacramento, to a great extent below the mouth of the American, from 6 to 12 feet. In consequence, the beds of the two rivers have shallowed and their channels widened so that the depths of the rivers have greatly lessened and their liability to overflow has been materially increased, causing the frequent floods to extend their area and to be more destructive than they otherwise would have been, and covering thousands of acres of good land in the Sacramento valley with mining *debris*. And as the rivers are at all times carrying in suspension the lighter earthy matter from the mines, and washing down the heavier *debris*, they are likely to fill more rapidly in the future in proportion to the quantity of hydraulic tailings than in the past, and to cause much further and greater injury in the future to large tracts of land,—probably rendering them, within a few years, unfit for cultivation and inhabitancy. Besides, the discharge from the mines so fouls the water of the American river at all points below as to make it unfit for any domestic use by the inhabitants. And from the same cause "the navigation of the Sacramento river has been so greatly impaired that the river, which, until the year 1862, was navigated as far as the city of Sacramento without difficulty by steamers of deep draught, to-wit., by boats drawing nine or ten feet of water, has been, since the year of 1862, unnavigable as far as the city of Sacramento by boats of deep draught, except during high water, instead of at all times, as formerly. And there is imminent danger, if the acts of the defendant and others engaged in hydraulic mining are allowed to continue, that the beds and channels of the lower portion of the American river, and of the Sacramento river below the mouth of the American, will be so filled and choked up by tailings and other deposits, that said rivers will be turned from their channels, cutting new water-ways, injuring or destroying immense tracts of land, and probably will result in greatly impairing the navigability of the Sacramento river."

Vast as may be the interests bound up in the litigation, yet the questions for the consideration of this court, arising out of the facts as found by the court below, lie within a comparatively narrow compass. All of them flow into one, as the main question at issue, and that is, whether the defendant, as owner of its hydraulic mines situate on the banks of the American river,—an unnavigable stream which empties its waters into the Sacramento river, the principal navigable river within the state,—has the right to dump its hydraulic *debris* into the river to the endangerment of habitation and cultivation of large tracts of country, upon which are cities, towns, and villages, and to the impairment of the navigation of the Sacramento river; and if there exists no such right in the defendant, do the acts committed by it, and which it threatens to continue to commit, involving such consequences, constitute a public nuisance which may be enjoined in an action in the name of the people of the state? Courts take judicial notice of the navigability of the Sacramento river; in addition to which the court below has found that the river has been declared by law navigable to the mouth of Middle creek, which is above the confluence of the American and Sacramento rivers, “and has been continually navigated by steamers, barges, schooners, and smaller craft, and up to 1862 was navigated as far as the city of Sacramento, without difficulty, by steamers of deep draught, to-wit, by boats drawing nine or ten feet of water.” Navigability in law and in fact has therefore been established. As a navigable river, the Sacramento is a great public highway, in which the people of the state have paramount and controlling rights. These rights consist chiefly of a right of property in the soil, and a right to the use of the water flowing over it, for the purposes of transportation and commercial intercourse. The soil of a navigable river is the *alveus* or bed of the river; the river itself is the water flowing in its channel. An unauthorized invasion of the rights of the public to navigate the water flowing over the soil is a public nuisance; and an unauthorized encroachment upon the soil itself is known in law as a purpresture. Purpresture is also a particular kind of nuisance. The word is derived from the French word *pourpris*, which signifies an inclosure. “That is,” says Coke, “when one encroacheth and makes that serviceable to himself which belongs to many; and because it is properly when there is an inclosure made of any part of the king’s demesne, or of a highway, or a common street, or public water, or such like things.” 2 Co. Inst. 271.

Great water highways belong to the same class of public rights, and are governed by the same general rules applicable to highways upon land. Any contracting or narrowing of a public highway on land is a nuisance, (Russ. Cr. 349,) and all unauthorized intrusions upon a water highway for purposes unconnected with the rights of navigation or passage are nuisances. *Com. v. Caldwell*, 1 Dall. 150; *Com. v. King*, 13 Metc. 115; sections 3479, 3480, Civil Code.

To make use of the banks of a river for dumping places, from which to cast into the river annually 600,000 cubic yards of mining *debris*, consisting of bowlders, sand, earth, and waste materials, to be carried by the velocity of the stream down its course and into and along a navigable river, is an encroachment upon the soil of the latter, and an unauthorized invasion of the rights of the public to its navigation; and when such acts not only impair the navigation of a river, but at the same time affect the rights of an entire community or neighborhood, or any considerable number of persons, to the free use and enjoyment of their property, they constitute, however long continued, a public nuisance.

In *Veazie v. Dwinel*, 50 Me. 479, certain mill occupants on the Penobscot river were accustomed to throw slabs, edgings, and other waste materials from their mills into the river, to float or sink, and obstruct navigation. The supreme court compelled the discontinuance of the practice. "Highways," said the court, "whether on land or water, are designed for the accommodation of the public for travel or transportation. * * * They cannot be made the receptacles of waste materials, filth, or trash, nor the depositories of even valuable property, so as to obstruct their use as public highways. * * * If, therefore, any person obstruct a stream which is by law a public highway, by casting therein waste material, or filth, or trash, or by depositing material of any description, except as connected with the reasonable use of such stream as a highway, or by direct authority of law, he does it at his peril,—it is a public nuisance." And in *Gerrish v. Brown*, 51 Me. 262, the court reiterates the same doctrine: "A person who casts at random filth, or trash, or waste materials into a public river to float or sink, as it may, without guidance or direction, can in no sense be said to be in the use of such river for lawful purposes." But it is contended that, as the nuisance complained of, and found by the court, was the result of the aggregate of mining *debris* dumped into the stream by the defendant and other mining companies, acting separately and independently of each other, the acts of the defendant cannot be joined with the acts of other mining companies to create a cause of action against the defendant. The contention is made upon a finding by the court as follows:

"On the American river and its tributaries a vast amount of mining was done in early times, and up to this time a great deal is being done, besides that by the defendant. No other mine contributes annually more *detritus* to the river than the defendant; still I am unable to say that defendant's mine alone, without reference to the *debris* from other mines, materially contributes to the evils mentioned; or, in other words, if there were no mining operations save those of the defendant, I am not prepared to say that it would materially injure the valley lands or the navigation of the river. It is the aggregate of *debris* from all the mines which produces the injuries mentioned in these findings."

And it is attempted to sustain the contention by the cases of *Chipman v. Palmer*, 77 N. Y. 51; *Schuylkill Nav. Co. v. Richards*, 57 Pa.

St. 142; *Sellick v. Hall*, 47 Conn. 260; and *Keyes v. Little York G. W. & W. Co.* 53 Cal. 724. The first three of those cases were actions on the case for damages: the *first*, for polluting the water of a stream by the discharge of sewage therein; the *second*, for the filling up of the basin of a dam and water-power with coal-dirt and waste material cast into a stream by separate collieries, working their mines on the stream independently of each other; and the *third*, for the overflow of a brook obstructed by the defendant, and other persons who were not parties to the action. Each of those cases was decided upon the principle that where several persons, acting independently of each other, engage in the commission of wrongful acts, the torts are distinct and not joint, and each is only severally liable for the injury caused by his own acts, and not for the torts of others with whom he was not acting in concert. There can be no doubt of the correctness of that principle, and of its applicability to an action at law for the recovery of damages for the violation of a private right. But in the case of *Keyes v. Little York G. W. & W. Co.* the late supreme court of this state applied the principle to an action in equity by which the plaintiff sought to enjoin a number of persons, who, without privity or concert of action, contributed to the washing down from their mining claims mining debris into a stream which carried it down and spread it over the plaintiff's land, rendering it valueless. To the complaint in the action the court sustained a demurrer upon the ground of misjoinder, because all who contributed to the injury complained of could not be joined as defendants without an averment that they acted in concert in the commission of the wrongful acts charged against them. That case, however, was practically overruled by this court in *Hillman v. Newington*, 57 Cal. 62. That also was a case in which the plaintiff sued a number of persons to recover damages for the wrongful diversion of the water of a stream, and to perpetually enjoin them from diverting the same. The defendants answered, as in *Keyes v. Little York G. W. & W. Co.* that they were improperly joined in the action, because they acted severally and not jointly. But this court said: "Each of the defendants diverts some of the water, and the aggregate reduces the volume below the amount to which the plaintiff is entitled, although the amount diverted by any one would not. * * * All who act must therefore be held to act jointly," and the damages and costs may be apportioned by the court sitting as a court of equity. This case clearly recognizes the equitable principle that in an action to abate a public or private nuisance all persons engaged in the commission of the wrongful acts which constitute the nuisance may be enjoined jointly or severally. It is the nuisance itself which, if destructive of public or private rights of property, may be enjoined.

King v. Trafford, 1 Barn. & Adol. 874, was a criminal action for a public nuisance to a public canal navigation established by act of parliament. The jury found that the acts creating the nuisance were

done by the defendants separately; but it was held, nevertheless, that as the nuisance was the result of all those acts jointly, the defendants were rightly joined in one indictment which stated the acts to be several.

Whenever an indictable nuisance exists, there is a co-ordinate remedy in equity to abate it by injunction. In an equitable action for that purpose there is generally raised no question of damages. Until the adoption of the Codes such a question could not be raised in an action in equity for the abatement of a nuisance. The only question was whether the nuisance complained of and sought to be redressed had been committed; and it was no answer, in such an action, where there was no question as to a separate or joint liability for damages in the case, to say that other persons were committing the same sort of nuisance. *Crossley v. Lightowler*, L. R. 3 Eq. Cas. 279; *Chipman v. Palmer*, 77 N. Y. 51. So, in *Woodyear v. Schaefer*, 57 Md. 9, it is said:

"It is no answer to a complaint of nuisance that a great many others are committing similar acts of nuisance. Each and every one is liable to a separate action, and to be restrained. * * * The extent to which the appellee has contributed to the nuisance may be slight and scarcely appreciable. Standing alone it might well be that it would only very slightly, if at all, prove a source of annoyance. And so it might be as to each of the other numerous persons contributing to the nuisance. Each, standing alone, might amount to little or nothing; but it is when all are united together, and contribute to a common result, that they become important as factors in producing the mischief complained of. And it may only be after from year to year the number of contributors to the injury has greatly increased, that sufficient disturbance of rights has been caused to justify a complaint. * * * In that state of facts * * * each element of contributive injury is a part of one common whole, and to stop the mischief in the whole each part in detail must be arrested and removed."

But it is also claimed that the defendant has acquired the right from custom, and by prescription and the statute of limitations, to use the American and Sacramento rivers as outlets for its mining *debris*; and that in the exercise of this right it cannot be restrained in its business of hydraulic mining, notwithstanding the consequent injuries to those rivers. Undoubtedly, the fact must be recognized that in the mining regions of the state the custom of making use of the waters of streams as outlets for mining *debris* has prevailed for many years; and, as a custom, it may be conceded to have been founded in necessity, for without it hydraulic mining could not have been economically operated. In that custom the people of the state have silently acquiesced, and, upon the strength of it, mining operations, involving the investment and expenditure of large capital, have grown into a legitimate business, entitled, equally with all other business pursuits in the state, to the protection of the law. But a legitimate private business, founded upon a local custom, may grow into a force to threaten the safety of the people, and destruction to public and private rights; and when it develops into that condition the

custom upon which it is founded becomes unreasonable, because dangerous to public and private rights, and cannot be invoked to justify the continuance of the business in an unlawful manner. Every business has its laws, and these require of those who are engaged in it to so conduct it as that it shall not violate the rights that belong to others. Accompanying the ownership of every species of property is a corresponding duty to so use it as that it shall not abuse the rights of other recognized owners. Sections 3479, 3514, Civil Code; 731, Code Civil Proc. Upon that underlying principle neither state nor federal legislatures could, by silent acquiescence, or by attempted legislation, take private property for a private use, nor divest the people of the state of their rights in the navigable waters of the state for the use of a private business, however extensive or long continued.

As we have already said, the rights of the people in the navigable rivers of the state are paramount and controlling. The state holds the absolute right to all navigable waters and the soils under them, subject, of course, to any rights in them which may have been surrendered to the general government. *Martin v. Waddell*, 16 Pet. 410. The soil she holds as trustee of a public trust for the benefit of the the people, and she may, by her legislature, grant it to an individual, but she cannot grant the rights of the people to the use of the navigable waters flowing over it. These are inalienable. Any grant of the soil, therefore, would be subject to the paramount rights of the people to the use of the highway. And such was the doctrine of the common law. "The *jus privatum*," says Lord HALE, in *De Jure Maris*, 22, "must not prejudice the *jus publicum* wherewith public rivers and arms of the sea are affected to public use." It is, therefore, beyond the power of legislatures to destroy or abridge such rights, or to authorize their impairment.

As to the claim of right derived from prescription and the statute of limitations, it is sufficient to say that a right to continue a public nuisance cannot be acquired by prescription, (*Pettis v. Johnson*, 56 Ind. 139; *Boston Rolling-mills v. Cambridge*, 117 Mass. 396; *Wright v. Moore*, 38 Ala. 593; *People v. Cunningham*, 1 Denio, 524; *Mills v. Hall*, 9 Wend. 315;) nor can it be legalized by lapse of time. Section 3490, Civil Code. Against it, however long continued, the state is bound to protect the people; and for that purpose the attorney general, as the law officer of the state, has the power to institute a proceeding in equity, in the name of the people, to compel the discontinuance of the acts which constitute the nuisance. *County of Sacramento v. Central Pac. R. Co.* 10 Pac. C. Law J. 27; 61 Cal. 250; *People v. Stratton*, 25 Cal. 242; *Yolo Co. v. Sacramento*, 36 Cal. 193. As was said in *People v. Booth*, 32 N. Y. 397:

"The remedy to prevent the erection of a purpresture and nuisance in a bay or navigable river is by injunction at the suit of the people by their attorney general; for all the people of the state are interested in the question, and have

the right to use all bays and navigable rivers within the state, and I think the attorney general may maintain an action in the name of the people of the state to prevent the obstruction of a public highway, which all the people have a right to travel, because all of them have an interest in such highways."

There is no prejudicial error in the record. Judgment for a perpetual injunction and order affirmed.

We concur: MYRICK, J.; MORRISON, C. J.

McKINSTRY, J. I concur in the conclusions reached by Mr. Justice McKEE with reference to the questions by him considered and discussed. But in my opinion the case of *Keyes v. Little York Co.* 53 Cal. 724, has no direct bearing upon any question presented in the case now here. That was an action by an individual proprietor, his claim to an injunction being based upon alleged facts showing that he had suffered, by reason of a public nuisance, special injuries, differing in kind and degree from those sustained by other members of the public; either so, or an action to restrain a private nuisance. There, many persons whose acts had been several, and not even concurrent, were made defendants. The complaint in the action now here is in the nature of an information by the attorney general on behalf of the people of the state; and the Gold Run Ditch & Mining Company is the sole defendant. Among other matters, the court below found:

"Said defendant has been mining its said tracts of land for about eight years last past in the mode and process aforesaid; and up to the time of commencing this action, and during about five months of each year of said period, has been daily discharging into the said north fork between four and five thousand cubic yards of solid material from its said mine, to-wit, of bowlders, cobbles, gravel and sand, making a yearly discharge of at least six hundred thousand cubic yards, and will continue to discharge that quantity annually if the working of said mine be permitted to continue, and at such rate it will require some thirty years to mine out and exhaust said mineral land; that a large portion of the material so dumped by the defendant into the north fork of the American river has been washed down said river by the water and commingled with tailings from other hydraulic mines, and still other material which is the product of natural erosion has been deposited in the beds and channels of the Sacramento and American rivers, but mostly in the American river and upon the lands adjacent to said rivers; and that by said mining of the defendant and other mines the filling up, raising, and shallowing of said rivers has been materially increased, to the impairment of the navigation of the Sacramento river, and to the excessive overflow of the lands adjacent to said rivers, to the great injury of said land, and damage, discomfort, and annoyance of a great number of citizens of the state, owners of said land and residents of said valley."

The court found that a public nuisance had been created when this action was commenced. And the court also found that defendant was adding to, and, unless restrained, would continue to add to, the obstructions which constituted the nuisance, and thus to aid in in-

creasing and perpetuating it. This made a proper case for an injunction. Appellant attaches grave consequences to a further finding which is supposed to qualify those which precede it:

"On the American river and its tributaries a vast amount of mining was done in early times, and up to this time a great deal is being done besides that by the defendant. No other mine contributes annually more *debris* to the river than the defendant; still I am unable to say that defendant's mine alone, without reference to the *debris* from other mines, materially contributes to the evils mentioned; or, in other words, if there were no mining operations save those of the defendant, I am not prepared to say that it would materially injure the valley lands or the navigation of the river. It is the aggregate of *debris* from all the mines which produces the injuries mentioned in these findings."

It is urged that while the complaint alleges the defendant has materially contributed and will materially contribute to the nuisance, the judge below has declared "he is unable to say" that defendant's mine alone materially contributes to the evil; which (it is claimed) is either a finding that defendant's mine does not materially contribute, or the court has failed to find on the *material* issue. But the meaning of the language which immediately precedes it is rendered very clear by the clause in the finding last quoted: "Or, *in other words*, if there were no mining operations save those of the defendant, I am not prepared to say that it would materially injure the valley lands or the navigation of the river." But the contributions of defendant may have been material,—substantial, real, and appreciably capable of rendering more durable and more injurious an existing nuisance,—although of themselves they would not in their aggregate have produced the mischief mentioned in the findings. There is no contradiction, therefore, between the finding last referred to and those which determine that a large portion of the material dumped by defendant into the North Fork has been washed down and deposited in the beds and channels of the Sacramento and American rivers, etc. None of the findings can be construed as deciding that the deposits made by defendant have contributed or will contribute to the shoaling of the waters in so slight a degree as not substantially to affect the building up or continuation of the obstructions to their flow in the natural channels of the rivers.

THORNTON, J. Whether *Keyes v. Little York Co.* 53 Cal. 724, is or not overruled by *Hillman v. Newington*, 57 Cal. 62, I express no opinion. No question of that kind, in my judgment, is involved in this case or necessary to its decision, and therefore I forbear to give any opinion upon it. As to the other points discussed in the opinion of Justice McKEE, I agree with what is said, and the conclusion reached by him.

SHARPSTEIN and ROSS, JJ. We think the decree in its entirety should be affirmed.

66 Cal. 171

TUEBNER v. CALIFORNIA-STREET R. Co. (No. 8,191.)

Filed November 28, 1884.

1. NUISANCE—RIGHT TO USE AND ENJOYMENT OF PROPERTY.

A person must not use his property, though in a lawful business, in such a manner as to interfere with the rights of another to the use and enjoyment of his property.

2. SAME—STREET CABLE RAILROAD—LICENSE.

The maintaining and use on property adjoining plaintiff's, of a steam-engine for the purpose of propelling cars by means of a cable, by which use plaintiff's adjoining building was constantly shaken, plaster cracked, and premises covered with soot, besides a loud and continuous noise being produced, constituted a nuisance for which the street-car company was liable; and a license from the municipality to operate such road, and all machinery necessary thereto, was not a justification of such nuisance.

3. SAME—ABATEMENT—DAMAGES.

In an action to abate a nuisance, and for damages for injuries sustained, the fact that the nuisance has since been abated does not interfere with plaintiff's right to recover damages for injuries already sustained.

4. SAME—MEASURE OF DAMAGES.

The measure of damages for injury by a nuisance is a question for the jury, and they may determine a reasonable sum as a proper compensation; it is not necessary for the plaintiff to prove the value of his injury.

Department 1. Appeal from the superior court of the city and county of San Francisco.

Harvey S. Brown and J. E. Foulds, for appellants.

E. F. Preston, for respondent.

MYRICK, J. The action was brought to abate an alleged nuisance and to recover damages. The jury gave a verdict for the plaintiffs for \$1,000 damages, and from the judgment rendered therefor and an order denying a new trial, the defendant appealed.

The case is, in substance, as follows: The plaintiffs, owners of a lot of land near the corner of Larkin and California streets, in the city and county of San Francisco, had thereon two dwelling-houses, (one occupied by the family of one of the plaintiffs, the other by the family of the other plaintiff,) and on the rear of the lot a two-story building, in the lower story of which the plaintiffs carried on the manufacture of show-cases, the upper story being occupied by a tenant. The defendant constructed a street railroad along California street, and, for the purpose of using steam as a motive power in propelling the cars, by means of a cable, constructed a building on the corner of the streets above named, which building adjoined the property of plaintiffs. This building was used in connection with the street railroad as a car-house, and had an engine and furnace, with a smoke-stack extending to a point 20 feet higher than plaintiffs' houses. Cars were elevated from one story to another by the aid of machinery. We quote substantially from the testimony of plaintiffs for the purpose of showing the case as presented by them to the court and jury:

"From the time the railroad commenced running, about February 1, 1878, to August 2, 1878, when this suit was commenced, we were annoyed by soot, and by the machinery, and the elevator running up and letting down cars. It shook the whole house; commenced about 7 o'clock in the evening, and continued until 10, 11, or 12 o'clock at night,—sometimes until 1 and 2; the noise was continuous during that time; there was a jarring and shaking of the building; the plastering was cracked some; the elevator sometimes shook the whole house; the soot came from the smoke-stack to our houses, and came in at the windows, and in the back yard; in the morning I could clean up a whole pailful; if I lay my hand on the banisters, they are all black; we were troubled every day with soot; if I open the windows, the dust comes into the whole house; in the evening, sometimes when I am reading the paper, they would put the cars upon a small track; I would jump up, thinking it was an earthquake; the noise mostly is when they are elevating the cars; when the cars went in, there was shaking and soot that troubled us all the time; sometimes it shook the house so you would have thought it was an earthquake; as for the soot, it was not possible to clean the stairs or place; if you clean it four or five times, it would be the same thing over."

Besides a denial of the shaking, noises, and soot, the defendant pleaded its incorporation for the purpose of operating a street railroad along California street with endless ropes and stationary steam-engines, and that it had authority from the board of supervisors of the city and county so to operate its road, and that all the structures and machinery were necessary to that end, and were properly constructed and operated. When the defendant offered the orders of the board of supervisors in evidence, the court sustained the plaintiffs' objection thereto. The defendant assigns this ruling as error, on the ground that if it had the legal right to run its cars along the street, the acts complained of could not constitute a nuisance, because the doing of that which is lawful cannot be a nuisance. If this position be correct, in its application to this case, the court erred. There is no doubt that the municipality may grant the right to run cars along streets, to be drawn by horses or propelled by steam. The annoyances complained of were not the immediate result of the running of cars; they were caused by the stationary furnace and machinery of the defendant on its own premises. If the defendant had the right to operate its furnace and machinery in the manner and with the result detailed, the orders of the board of supervisors would not add to such right. The object of the testimony offered was to show that the defendant, in operating its road, was doing a legal act, and to claim that, as a stationary engine was necessary, all results to follow the reasonable use of the engine and its appliances were also legal.

To sustain the ruling of the court it must be conceded that the defendant had a legal right to run its cars on the street, propelled by the use of steam-power. The question, then, is presented: Had the defendant the right to use its own property, (the lot at the corner of the streets,) in a lawful business, in such a manner as to produce the results complained of? Any person may use his own property in such lawful manner as to him may seem fit, having reference always

to the right of others to use their property. A person may not use his own property, even in and about a business in itself lawful, if it be used in such a manner as to seriously interfere with another in the enjoyment of his right in the use of his property. It is declared by the Civil Code (section 731) that "anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action," and damages may be recovered. It is said by Cooley, in his work on Torts, 600, that "where manufacturing operations are carried on with heavy machinery in the part of a city mainly occupied by residences, the jar of machinery may constitute a serious nuisance, injurious, not to comfort merely, but to health; it is usually increased also by smoke, soot, etc." "If the smoke or dust, or both, that rises from one man's premises and passes over and upon those of another, causes perceptible injury to the property, or so pollutes the air as sensibly to impair the enjoyment thereof, it is a nuisance. But the inconvenience must be something more than mere fancy—mere delicacy or fastidiousness; it must be an inconvenience materially interfering with the ordinary comfort, physically, of human existence; not merely according to elegant and dainty modes and habits of living, but according to plain, sober, and simple notions." If a business be necessary or useful, it is always presumable that there is a proper place and a proper manner for carrying it on. It can hardly be said that is a lawful business which cannot be carried on without detriment to surrounding people. Some classes of business constitute a nuisance *per se*; others may or may not create a nuisance, according as they shall be carried on. The keeping of a hotel or restaurant is a lawful and very necessary business,—equally so with running street cars; yet it could not be held that a person carrying on such business, or any other requiring a large consumption of fuel, could erect his chimney to a height that would discharge the smoke and soot into his neighbor's window. It is true, as urged by appellant, that persons preferring to live in cities, rather than the country, must accept many inconveniences,—probably all that naturally and necessarily flow from the concentration of populations; but that doctrine should not be carried too far. The law looks to a medium course to be pursued by each for the mutual benefit of all.

Applying these principles to the facts as presented by the plaintiffs, we are of opinion that it was competent for the jury to determine whether the defendant was carrying on its business in a proper manner; whether the acts complained of were substantially offensive to the senses of the plaintiffs, or obstructed them in the free use of their property, so as to interfere with their comfortable enjoyment of it. It may have been that a smoke-stack but 20 feet high would foul the plaintiffs' premises, and that one 40 feet high would not. It may have been convenient for the defendant to hoist its cars from one

story to another, and yet not absolutely necessary; or it may be that the hoisting could have been done without causing a jarring producing actual discomfort or injury.

As said above, the municipality could grant a franchise for running cars along the street, but it could not grant a franchise to materially injure the plaintiffs in their property rights. The franchise which the defendant claimed to hold did not even assume to be for that end. We are aware of the decisions that where a franchise has been granted for the running of steam-cars along a street, property owners along the line must abide the natural results of a reasonable and proper exercise of the franchise; but we are of opinion that the reason of those decisions has no application here. The fact that the defendant had since the commencement of the suit (if such be the fact) remedied the evil complained of, would not interfere with plaintiffs' right to recover damages for injuries sustained before the commencement of the suit. It was not incumbent on the plaintiffs to prove their injury by value; it may have been of trivial cost to sweep up a pailful of soot, and yet the soot may have caused serious injury; it may also have been quite out of the question to prove the loss in value sustained by the jarring. It was for the jury to determine a reasonable sum to be proper compensation.

We have examined the points presented by appellant, and are of opinion that they are substantially covered by the foregoing. Judgment and order affirmed.

I concur: SHARPSTEIN, J.

THORNTON, J. I concur in the judgment. The evidence as to the amount in money of the damages accrued was very slight, yet as the damages found for the injury suffered are not excessive, I do not think the judgment should be disturbed for that reason. That the acts committed by the defendant constituted a nuisance is clear; nor were such acts either directly or indirectly permitted to be done by the express authority of a statute.

Filed November 28, 1884.

1. CARRIERS OF PASSENGERS—NEGLIGENCE—COLLISION.

Where the injury of a passenger by a collision is the result of mutual negligence of the carrier and of the driver of another vehicle, such passenger may recover from the owners of either or both vehicles. Though the plaintiff sue both, he may, ordinarily, dismiss as to either, and, if it be proven that one was not guilty of negligence, he may, on sufficient evidence of negligence, take a verdict against the other.

2 SAME—EVIDENCE—PROOF—INSTRUCTIONS.

In an action by a passenger of one carrier against another carrier, for injury caused by a collision between both, he must prove negligence against the defendant, not presumption of negligence arising against such carrier from the fact of the injury. The defendant would be entitled to an instruction of this nature, and a general instruction that plaintiff must make out his case by a preponderance of evidence is not equivalent thereto.

3. SAME—ESTOPPEL—RELEASE OF CARRIER FROM LIABILITY.

A release or discharge of one carrier from all liability on account of the injury, for a compensation, operates as an estoppel of the passenger to deny the liability of such carrier, and prevents him from afterwards maintaining an action against the other carrier for the same injury.

Department 1. Appeal from the superior court of the city and county of San Francisco.

Estee & Boalt, for appellant.

Garber & Thornton and *Fred. A. Berlin*, for respondents.

MCKINSTRY, J. A car of the Clay-street Hill Company collided with a car of the Sutter-street Railroad Company at the crossing of Clay and Polk streets, San Francisco. Plaintiff, a passenger in the car of the latter company, was thrown from her seat and injured. The complaint charges neglect on the part of both companies. Plaintiff recovered damages of the Clay-street Company, and the appeal is by that company.

In Pennsylvania it seems to have been held that when a passenger on a carrier vehicle is injured by a collision resulting from the mutual negligence of those in charge of it and another party, the carrier alone must answer for the injury, (*Lockhart v. Lichtenthaler*, 10 Wright, 151; *Philadelphia & R. R. Co. v. Boyer*, 97 Pa. St. 100;) but the weight of authority is otherwise, and is to the effect that if the negligence of the managers of both vehicles contributes to the injury, the party injured may recover from the proprietors of either or of both. Whart. Neg. 395, and cases cited. Where both are sued, the plaintiff may ordinarily dismiss as to either, and if it turn out at the trial that one was not guilty of negligence, he may, on sufficient evidence, take a verdict against the other. The court below charged the jury:

"In civil cases (and this is a civil case) the affirmative of the issue must be proved, and when the evidence is contradictory, your decision must be made according to the preponderance of the evidence."

But the court refused to charge,—at the request of defendant, the Clay-street Hill Railroad Company,—

"If you find from the evidence that the plaintiff was a passenger on the street car of the defendant the Sutter-street Railroad Company, then I instruct you that no presumption of negligence, as against the Clay-street Hill Railroad Company, arises from the fact of the injury, and that the plaintiff must show, by a preponderance of the testimony, that the defendant the Clay-street Hill Railroad Company was guilty of negligence."

The appellant was entitled to have the attention of the jury called to the point, that, in considering the evidence, the mere circumstance that plaintiff had been injured as a result of the collision did not

create a presumption of negligence on appellant's part. The general charge, to the effect that the plaintiff must make out her own case by a preponderance of evidence, was not the equivalent of the specific instruction requested. The defendant the Clay-street Railroad Company also asked the court to charge:

"(2) You are instructed that if you find from the evidence that the plaintiff has received from the Sutter-street Railroad Company, one of the defendants in this action, compensation for the injuries alleged in the complaint, your verdict must be for the defendant. (3) The Sutter-street Railroad Company is joined as a defendant in this action with the Clay-street Hill Railroad Company. The plaintiff, by her complaint, alleges a joint injury, and asks for a joint judgment against the two defendants. The defendant Clay-street Hill Railroad Company, by its supplemental answer, avers that plaintiff has released and discharged the Sutter-street Railroad Company. If you find from the evidence that the plaintiff has received any sum of money whatever from the defendant Sutter-street Railroad Company, as compensation for the injuries received by her, and has released and discharged the defendant the Sutter-street Railroad Company from all claim for damages arising out of this action, then you are instructed to bring in your verdict for the defendant the Clay-Street Hill Railroad Company."

To the refusal to give the instructions asked the said defendant excepted. If both defendants were guilty of negligence, it seems to be conceded by respondent the requested instructions, or one of them properly declared the law; and such was the view of the court below. The learned judge charged the jury:

"If you find from the evidence that both defendants are jointly in fault for the plaintiff's injuries, you will find a verdict for the defendant, because the payment by the Sutter-street Company operates as a release to both defendants. If, however, you find that only the Clay-street Hill Railroad Company was in fault, you will find a verdict for the plaintiff against that defendant, and assess the damages. You are instructed that if you find from the evidence that the plaintiff has received from the Sutter-street Railroad Company, one of the defendants in this action, compensation for the injuries alleged in the complaint, your verdict must be for the defendants, unless you find that the defendant who paid the money was innocent of fault as to the tort."

Every party contributing to the injuries of plaintiff was liable to the full extent of the damages by her sustained. Her injuries gave her but a single cause of action. If she had brought a separate action against the Sutter-street Company, and recovered a judgment therein, and such judgment had been satisfied, she could not subsequently have maintained another action for the same injuries against the Clay-street Company, inasmuch as the conclusive presumption would be that she had already received full compensation for all damages by her sustained. Damages resulting from the same wrongful transaction are ordinarily inseparable; she could not recover part from one and part from the other defendant. And so, if her damages resulted directly from the negligence of both defendants, and plaintiff received from the Sutter-street Company compensation for her injuries, and released that company, she ought not to have re-

covered a judgment against the Clay-street Company. As was said in *Urton v. Price*:

"It is to be observed when the bar accrues in favor of some of the wrongdoers by reason of what has been received from or done in respect to one or more of the others, that the bar arises, not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent." 7 Pac. C. Law J. 82; 57 Cal. 272.

And Judge COOLEY, from whose book on the Law of Torts the foregoing observation is taken, adds:

"Therefore, if he receives the satisfaction voluntarily made by one, that is a bar as to all." Page 139.

It is urged by counsel for appellee that the rule only applies where the money is paid by, or the release executed to, one who is himself actually guilty of the wrong or negligence. If it be conceded that a release to, or receipt of money in alleged satisfaction from, one not himself a trespasser, will not discharge those actually guilty, the question still remains: Can the plaintiff, under the circumstances, be permitted to deny that the Sutter-street Railroad Company was guilty of negligence directly contributing to the injuries by her received? Reading the release and stipulation in the record, it is plain the \$550 was paid in settlement of the action pending, in so far as the cause of action alleged constituted a claim against the Sutter-street Company. The compromise of an asserted claim does not necessarily involve an admission on the part of him against whom the claim is asserted that the claim is well founded. But one who, having commenced an action against another, has received money in consideration that the action shall be dismissed, or that any judgment he may recover shall not be enforced, ought not to be permitted to deny that he received the money in satisfaction of a valid demand. The defendant paying the money may subsequently say: "I did not and do not admit that I ought to have paid anything; I was willing to buy my peace." But the other party ought not to be allowed to deny that he had any right to the money, the payment of which he had induced under pain of the prosecution of an action already commenced. He should not be permitted to say, with any beneficial result to himself, "I pursued the defendant *false clamore*, and I took his money by way of settlement of a pending action in which I never could have recovered." Shall it be said that plaintiff has not received compensation for the injuries she sustained, because she did not choose affirmatively to prove that the negligence of the party from whom she received the money contributed to the injuries? The plaintiff must be held to have received from the Sutter-street Company satisfaction for the very same injuries for which she obtained a judgment against the appellant.

In *Turner v. Hitchcock*, 20 Iowa, 314, the notice by the plaintiff to one of the defendants was not a technical release, and there was

no evidence that it was given upon or for a consideration. It was at most a mere promise, without consideration, not to prosecute the action against the particular defendant, so that if he had been admittedly a co-trespasser with the other defendants, the notice would not have released the others. It had been well settled that a covenant not to sue is not such a *release* as will discharge the co-trespassers. The remark of the learned judge, "Nor do we think, as argued by appellee, that plaintiff, having sued Johnson as a joint trespasser, was estopped," etc., was not necessary to the decision; and while the suggestion may have been made by counsel for appellee in oral argument, the whole question as to a discharge of defendants by reason of the notice seems not to have been considered worthy of a place in their *points*, as printed in the report of the case. Under the circumstances, we think the remark referred to is not to be accorded the weight of a deliberate judgment upon a question involved in a legal controversy. Judgment and order reversed, and cause remanded for a new trial.

We concur: McKEE, J.; ROSS, J.

66 Cal. 173

TISCHLER v. CALIFORNIA FARMERS' MUT. F. INS. CO. (No. 8,473.)

Filed November 28, 1884.

1. FIRE INSURANCE—PLEADING—ACTION ON POLICY—COMPLAINT.

In an action to recover on a policy of insurance, when the application for the policy was merely verbal, the complaint need not allege the terms of the application.

2. SAME—FIRE—WORKS—GUNPOWDER—STIPULATIONS IN POLICY.

A stipulation in a policy of fire insurance, that if gunpowder is kept on the premises insured without written consent of the insurer the policy shall be void, will not invalidate the policy for the keeping of fire-works without the written consent of the insurer.

3. SAME—ANSWER—INCREASE OF RISK.

In an action on a policy of fire insurance, facts showing an increase of the risk, if relied on as a defense, must be set up in the answer or they cannot be taken advantage of.

Department 2. Appeal from the superior court of the city and county of San Francisco.

A. W. Thompson, for appellant.

Winans, Belknap & Godoy, for respondent.

Ross, J. 1. Appellant claims that, upon the authority of *Gilmore v. Lycoming F. Ins. Co.* 55 Cal. 123, defendant's motion for judgment on the pleadings should have been granted. Even if the policy involved in this case was similar to that involved in that, the decision

ion there would not be authority for sustaining the motion here in question. But in *Gilmore v. Lycoming Co.* the application of the insured was expressly made a part of the policy, and therefore constituted a part of the contract; and it having affirmatively appeared from the complaint in that case that all of the terms of the contract were not stated, but that a portion, which might prove material, had been omitted, the complaint, on demurrer, was held insufficient, and the demurrer sustained, with leave given the plaintiff to amend the complaint. In the present case, the application, as shown by the evidence, was a mere verbal one, which was authorized by the terms of the policy.

2. The policy sued on provides that it shall be void "if the risk be increased by any means," or "* * * if gunpowder, phosphorus, camphene, spirit gas, or chemical oils are kept or used on the premises without written consent." The property insured was the plaintiff's "stock of stationery, books, toys, and other merchandise" contained in a certain-described building. The defendant, by answer, set up that at the time the fire in question occurred the plaintiff had in his store, wherein was the property insured, "gunpowder, to-wit, a certain lot of fire-works and like combustible merchandise, made of gunpowder," without the written consent of defendant, and that the fire that destroyed the property insured "originated in and occurred by the combustion of said gunpowder in the said fire-works contained, and not otherwise." At the trial it was admitted that the fire "was caused by the explosion of a bomb thrown from the street among a lot of fire-works in plaintiff's store." The clause providing that the policy should be void "if the risk be increased by any means," may be laid out of consideration, inasmuch as that defense was not set up in the answer. *Cassacia v. Phoenix Ins. Co.* 28 Cal. 630; *Kentucky & L. M. Ins. Co. v. Southard*, 8 B. Mon. 634 *et seq.*; *Ferriss v. North American F. Ins. Co.* 1 Hill, 71.

It remains to consider whether the fire-works kept by the plaintiff rendered void the policy under that provision of it prohibiting the keeping or use on the premises of "gunpowder." Defendant introduced no testimony tending to show of what the fire-works were composed. They may be composed of various combustible materials—usually, we believe, of preparations of gunpowder, sulphur, and some other inflammable material or materials. But although gunpowder may be, and usually is, one of the constituents of fire-works, it by no means follows that "fire-works" are "gunpowder." The latter is "a mixture of saltpeter, sulphur, and charcoal, separately pulverized, then granulated and dried." It was the mixture called gunpowder, which, along with phosphorus, camphene, gas, and chemical oils, the plaintiff was by the policy in question prohibited from keeping or using on his premises without the written consent of defendant, under penalty of rendering the policy void. If defendant wished to provide that the policy should be void in the event the insured should

keep fire-works, it ought to have said so, as other companies do, as shown by the record in this case. Judgment and order affirmed.

We concur: MCKINSTRY, J.; MCKEE, J.

SAVINGS & LOAN SOC. v. DURKIN and others.

Filed November 28, 1884.

JUDGMENT AFFIRMED.

On authority of *Savings & Loan Soc. v. Bateman*, 10 Pac. C. Law J. 795, judgment and order affirmed.

Department 1. Appeal from the superior court of the city and county of San Francisco.

Mich. Mullany, for appellant.

A. N. Drown, for respondents.

Ross, J. In principle, this case is not distinguishable from *Savings & Loan Soc. v. Bateman*, No. 7,654, decided January 30, 1883, 10 Pac. C. Law J. 795, or the cases upon the authority of which that case was determined. In so far, however, as the judgment appealed from affects Edward Durkin and Patrick Durkin, it must be modified. As to them, a nonsuit was granted. On the authority of the cases hereinbefore referred to:

It is ordered that the order denying the motion for a new trial be and hereby is affirmed, and that the cause be and hereby is remanded, with directions to the court below to modify the judgment as here indicated, and, as so modified, it stands affirmed.

MCKINSTRY and MCKEE, JJ., concurred.

2 Cal. Unrep. 408

DUNPHY v. THE POTRERO Co. and others. (No. 7,067.)

Filed November 28, 1884.

APPEAL—PERSON NOT PARTY TO JUDGMENT.

A person cannot appeal from a judgment who is not a party nor privy thereto, nor injured thereby.

Department 1. Appeal from the superior court of the city and county of San Francisco.

T. J. Crowley and *A. Campbell, Jr.*, for appellant.

John A. Stanley, for respondents.

By THE COURT. This appeal is by Laura A. Mowrie from a judgment rendered in favor of the plaintiff against the following-named defendants, viz.: The Potrero Company, L. A. Lowrie, John Edwards, Ah Wing, Ah Wun, and Henry F. Williams. The appellant was not a party nor privy to, nor a person aggrieved by, the judgment; therefore her appeal must be dismissed. It is so ordered.

SWIM v. BERNARD. (No. 8,486.)

Filed November 28, 1884.

STOLEN STOCK CERTIFICATES—RIGHTS OF BONA FIDE PURCHASER.

On authority of *Barstow v. Savage Min. Co.* 1 PAC. REP. 349, judgment and order reversed.

Department 1. Appeal from the superior court of the city and county of San Francisco.

The facts in this case were similar to those in *Barstow v. Savage Min. Co.* 1 PAC. REP. 349.

H. J. Tilden, for appellant.

Jarboe & Harrison, for respondent.

By THE COURT. On the authority of *Barstow v. Savage Min. Co.* 1 PAC. REP. 349, judgment and order reversed, and cause remanded, with directions to the court below to enter judgment for plaintiff on the findings for possession of the property, or, in the event its delivery cannot be had, for its value and costs.

HOOPER v. POWERS. (No. 8,513.)

Filed November 28, 1884.

JUDGMENT AFFIRMED, WITH DAMAGES for frivolous appeal.

Department 1. Appeal from the superior court of the city and county of San Francisco.

Carson & Carson, for appellant.

H. C. Firebaugh, for respondent.

By THE COURT. There is no merit whatever in this appeal. Judgment and order affirmed, with 20 per cent. damages against the appellant.

SCHWEGERLE and others v. MUNDELL. (No. 8,408.)

Filed November 28, 1884.

JUDGMENT AFFIRMED.

Department 1. Appeal from the superior court of the city and county of San Francisco.

Cobb & Moore, for appellant.

J. D. Sullivan, for respondents.

BY THE COURT. The judgment was for the amount admittedly due the plaintiffs when the action was commenced. The alleged subsequent payment on account was not proved. No error appears in the judgment roll. It appears from the order for judgment made in open court, and in the presence of the attorney for defendant, that findings were waived. Judgment and order affirmed.

66 Cal. 178

ODD FELLOWS' SAVINGS BANK v. DEUPREY. (No. 8,514.)

Filed November 28, 1884

JURISDICTION—MOTION FOR NEW TRIAL.

The jurisdiction of a court to hear and determine a motion for a new trial is called into exercise by the final submission of the motion in a legal manner upon the bill of exceptions, statement of the case, or other papers designated in the notice of motion, or by a motion to dismiss or deny the motion for want of prosecution upon the ground that the party moving for the new trial has failed or neglected to serve or file within legal time the statement or other paper upon which he proposed to move; and when the court, thus in the exercise of its jurisdiction, has heard and decided the motion, its order is final and conclusive, and it is not erroneous to dismiss or deny a motion afterwards made to set it aside. An order granting or refusing a new trial, made after the regular submission of a motion for that purpose, is reviewable only on appeal, unless such order has been inadvertently or prematurely made.

Department 1. Appeal from the superior court of the city and county of San Francisco.

Columbus Bartlett, for appellant.

McClure, Dwinelle & Plaisance, for respondent.

McKEE, J. In this case there are three appeals. The first is from the judgment rendered the twenty-ninth of November, 1881; the second, from an order denying a motion for a new trial; and the third, from an order denying a motion to vacate the order refusing a new trial. After the decision of the case, defendant served upon the plaintiff's attorney notice that he would move for a new trial upon a proposed statement of the case, and upon affidavits and the minutes of the court. There was no extension of the statutory time for him to serve and file his proposed statement and affidavits, and in fact

he neither served nor filed any affidavits or proposed statement within the time required by law for that purpose. Upon a conclusive showing being made of that fact, the court, after argument of counsel of the respective parties, denied the motion for a new trial, "so far as the same was made upon the minutes of the court," and dismissed it for want of prosecution, so far as it purported to have been made upon a statement of the case or on affidavits. The order was entered January 6, 1882. Ten days after the entry of the order, defendant moved, on notice to the plaintiff's attorney, to vacate the same. The motion was made on affidavits, which showed that the proposed statement was not served within legal time, because of a mistake by the clerks of the attorney of record for defendant as to the date of the service of notice of the motion. But this mistake did not and could not change the record upon which the motion had been heard and determined. The fact still remained that the proposed statement had not been served or filed in time. And assuming that the court erred in denying the motion for a new trial, which had been regularly argued and submitted for decision, and that the subsequent order denying the motion to vacate its former order was a special order made after final judgment, and appealable, as seems to have been held in *Calderwood v. Peyser*, 42 Cal. 110, we see in it nothing erroneous.

The jurisdiction of a court to hear and determine a motion for a new trial lies dormant until it is called into exercise by the final submission of the motion, in a legal manner, upon the bill of exceptions, statement of the case, or other papers designated in the notice of motion. But it may be called into exercise by the submission of the motion itself, or by a motion to deny or dismiss the motion for want of prosecution, upon the ground that the party moving for the new trial has failed or neglected to serve or file within legal time the statement or other papers upon which he proposed to move; and when thus called into exercise, and the court, in the exercise of its jurisdiction, has heard and decided the motion, its order is final and conclusive, and it is not erroneous to dismiss or deny a motion afterwards made to set it aside.

An order granting or refusing a new trial, made after the regular submission of a motion for that purpose, is reviewable only on appeal. *Coombs v. Hibberd*, 43 Cal. 453; *Waggenheim v. Hook*, 35 Cal. 216; *Nichols v. Dunphy*, 10 Pac. C. Law J. 193. But it is otherwise where such an order has been inadvertently or prematurely made. If made, for instance, before the statement of the case or bill of exceptions, upon which it was to be made, has been settled, engrossed, and certified, and before the motion has been regularly submitted, the jurisdiction to hear and decide the motion was not called into exercise, the order would not be made in the regular exercise of the jurisdiction of the court, and, being improvidently made, it would be the duty of the court to set it aside. *Morris v. De Celis*, 41 Cal. 331;

Hall v. Polack, 42 Cal. 218; *Coombs v. Hibberd*, *supra*; and *Nichols v. Dunphy*, *supra*. Here, however, the power of the court to hear and decide the motion for a new trial was regularly put in motion, and the order of the court in the decision of the motion exhausted its power over it. The court became *functus officii*.

There was no error in overruling the motion for a new trial. There is no error apparent on the judgment roll. Judgment and orders affirmed.

We concur: ROSS, J.; MCKINSTRY, J.

66 Cal. 176

BULL v. FORD. (No. 8,034.)

Filed November 28, 1884.

1. FRAUDULENT CONVEYANCE—PURCHASER WITH NOTICE—ATTACHMENT.

A conveyance of property with intent to defraud the grantor's creditors, is void against the grantee or a subsequent purchaser who had notice, although he may have paid value. The creditors of such fraudulent grantor may cause such property to be attached and sold as though no conveyance had ever been made.

2. SAME—FRAUDULENT INTENT—SUFFICIENCY OF ALLEGATION.

To allege that a conveyance was made "with intent to hinder, delay, and defraud" the grantor's creditors, sufficiently avers fraudulent intent to sustain a judgment.

Department 1. Appeal from the superior court of the county of Santa Clara.

Kittredge & Halstead, for appellant.

D. M. Delmas, for respondent.

Ross, J. That the conveyance of Felipe Alvarado of all his interest in the *rancho* San Bernarbe to Ascencion Mendilla was without consideration, and made by Alvarado solely for the purpose of hindering, delaying, and defrauding his creditors, was distinctly found by the trial court, whose finding in that regard is not assailed. The asserted interest of the defendant in the property is derived from a conveyance from Mendilla, made at the instance and request of Alvarado. And with respect to that conveyance the finding is that at the time defendant took it he "well knew that the aforesaid conveyance from Alvarado to Mendilla was without any consideration, and a sham, and had been made with intent to hinder, delay, and defraud the creditors of Alvarado." It is urged that this finding is contrary to the evidence. But it is clear, under the rule prevailing here, that we cannot so hold.

The testimony of Alvarado and Mendilla, if true, was to the effect stated in the findings, and the credibility of the witnesses was for the court below to determine, and is not a matter for us to consider. Be-

sides, the instruction given by defendant to Mendilla not to answer the inquiry by the attorney of one of Alvarado's creditors in respect to the conveyance from Alvarado to Mendilla, strongly tended to show knowledge on the part of defendant of the real nature of the transaction. We must therefore accept the finding as stating the truth of the matter. And with that fact established the legal conclusion is the same, whether the further fact be, as testified by defendant, that the conveyance to him, although absolute in form, was in reality as security only for certain advances made by him, or the firm of which he was a member, to and on account of Alvarado, or, as testified by Alvarado, that defendant took the title without consideration, to hold for Alvarado, to the end that the creditors of the latter be hindered, delayed, and defrauded. *Bump, Fraud. Conv.* 483, 484, 594, 595; *Goodwin v. Hammond*, 13 Cal. 168; *Swinford v. Rogers*, 23 Cal. 236. The conveyance to defendant being void as against Alvarado's creditors, the creditors were authorized to levy upon and sell the property as if no conveyance had ever been made by their debtor. *Freem. Ex'ns*, § 136, and authorities there cited. This, the creditor under whom the plaintiff claims did, and by virtue of that sale the interest of Alvarado in the property became vested in the plaintiff.

But one other point need be noticed, and that is the claim that the allegation of the complaint that the conveyance in question was made "with intent to hinder, delay, and defraud" the creditors of Alvarado is an insufficient allegation of fraudulent intent. Whatever might be held if the point had been made by special demurrer, we think the allegation certainly sufficient after judgment and in the absence of such demurrer. The case of *Hager v. Shindler*, 29 Cal. 60, would, however, seem to sustain the averment in question, even in the face of a special demurrer. Judgment and order affirmed.

We concur: MCKINSTRY, J.; MCKEE, J.

66 Cal. 180

Estate of MERRIFIELD, Deceased. (No. 7,808.)

Filed November 28, 1884.

1. ESTATES OF DECEDENTS—ADMINISTRATOR—LIABILITY FOR INTEREST.

An administrator who uses the assets of the estate for his own profit is liable for interest thereon at the rate of 7 per cent. per annum, with annual rests.

2. SAME—DECREE OF DISTRIBUTION—APPEAL BY EXECUTOR OR ADMINISTRATOR.

Where an executor or administrator, as such, has no interest in a decree of distribution of an estate, it will not be reviewed on his appeal.

In bank. Appeal from the superior court of Solano county.

Wendell & Kelly, for appellant.

O. R. Coghlán, for respondents.

MYRICK, J. The court below made a decree settling the account of the administrator, and distributing the estate. From this decree the administrator, *as administrator*, appealed to this court.

1. In settling the account, the court found that the sum of \$5,540.61, assets of the estate, had been used by the administrator in his own business and for his own profit, and charged him with interest at the rate of 7 per cent. per annum, with annual rests. This finding is attacked for want of evidence to sustain it. We think the court was clearly justified in charging the administrator with the interest. Merrifield (administrator here) was the purchaser of real estate from the administrator of one Longmire, deceased,—the former husband of this intestate,—and in making payment therefor receipted to the administrator of Longmire for \$5,631, as received by him as administrator of the estate of his intestate, and returned in his inventory that amount of money in hand belonging to this intestate, Susannah Merrifield. He thus had his purchase, and had also the purchase money, which he, as administrator, did not set apart from his individual funds as money of the estate.

2. The appellant may have been interested as an individual in the distribution of the estate, claiming, as he did, to be the assignee of some of the heirs; but *as administrator* he had no interest. It is now well settled in this state that a decree of distribution will not be reviewed on an appeal by an executor or administrator where he, as such, has no interest in the matter sought to be reviewed. *Bates v. Ryberg*, 40 Cal. 463; *Estate of Marrey*, 3 PAC. REP. 896.

The decree is affirmed.

We concur: SHARPSTEIN, J.; ROSS, J.; MCKINSTRY, J.; MCKEE, J.; MORRISON, C. J.

2 Cal. Unrep. 410

GRANGE v. GOUGH. (No. 8,446.)

Filed December 2, 1884.

1. HOMESTEAD, WHAT CONSTITUTES—RESIDENCE.

A homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated, selected as provided by the statute, (Civil Code, 1237.)

2. FINDINGS—EVIDENCE.

Evidence held sufficient to justify the findings.

Department 2. Appeal from the superior court of the city and county of San Francisco.

John Wade, for appellant.

E. F. Preston, for respondent.

By THE COURT. The court found that the demanded premises were never at any time the separate property of the defendant Mar-

garet Gough, and that the defendants did not nor did either of them reside on said premises at the time of filing their declaration of homestead. A homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated, selected as provided in title 5 of the Civil Code. Civil Code, 1237.

We think the evidence, though conflicting, was sufficient to justify these findings. Judgment and order affirmed.

STOUT, Ex'r, *v.* HASTINGS. (No. 8,499.)

Filed December 2, 1884.

FINDINGS—JUDGMENT AFFIRMED.

Judgment *held* sustained by the findings.

Department 1. Appeal from the superior court of the city and county of San Francisco.

Calhoun Benham, for appellant.

J. S. Reynolds, for respondent.

BY THE COURT. The findings cover all the material issues raised by the pleadings, and are sufficient to sustain the judgment. Judgment affirmed.

SUPREME COURT OF CALIFORNIA.

66 Cal. 184

PEOPLE v. RIGHETTI. (No. 20,003.)

Filed December 2, 1884.

1. GRAND LARCENY—INFORMATION—VALUE OF ARTICLES STOLEN.

It is not necessary that an information for grand larceny, alleging the value of the articles stolen, should aver "that the value stated was in current coin of the United States."

2. SAME—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

An instruction that "if any witness has, in the opinion of the jurors, sworn falsely in any material respect, he is to be distrusted in all others, and his testimony is not to be accepted and acted on without great caution," is not erroneous. The omission or insertion of the word "willfully" before "sworn falsely" would not change the effect of the language in the charge.

3. SAME—VERDICT—LARCENY IN THE SECOND DEGREE.

Larceny is divided into two degrees: *First*, grand larceny; and, *second*, petit larceny;—and a verdict of "guilty of larceny in the second degree" is justified by the statute as standing for and representing petit larceny.

4. SAME—PETIT LARCENY—SENTENCE—FINE AND IMPRISONMENT.

The Penal Code, (section 1205,) providing that "a judgment that defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which must not exceed one day for every dollar of the fine," applies to cases of fine, whether the fine be coupled with a sentence of imprisonment, or whether the fine stand alone as the only punishment.

Department 2. Appeal from the superior court of San Luis Obispo county.

J. M. Wilcoxson, for appellant.

The Attorney General, for respondent.

BY THE COURT. Information for grand larceny. The defendant, Thomas Righetti, was separately tried. The information charges the theft to have been of 30 sacks of barley, of the value of \$45, and 7 sacks of wheat, of the value of \$12,—all of the value of \$57,—the property of Mark Elberg; and that the offense was committed in the county of San Luis Obispo, on the twentieth of September, 1883.

1. There is nothing in the point that the information should have averred "that the value stated was in current coin of the United States." *People v. Poggi*, 19 Cal. 600; Penal Code, 487. The articles are stated to have been taken at the same time and place, sufficiently to constitute grand larceny. The demurrer was therefore properly overruled.

2. The court instructed the jury: "If any witness has, in your judgment, sworn falsely in any material respect, he is to be distrusted in all others, and his testimony is not to be accepted and acted on without great caution." The defendant urges that the court should have said "willfully false," and cited, with other cases, *People v. Sprague*, 53 Cal. 494. The instruction given, preceding the sentence

in italics, is, in effect, the language of the statute. Code Civil Proc. 2061. This court held, in *People v. Sprague, supra*, that the word "willfully" did not change the effect of the language; that the word "false" is not the equivalent of "mistake." Therefore, if a witness be believed to have sworn "falsely," he is believed to have sworn so willfully. The addition of the words in italics constituted no error. If a witness is declared by law to be distrusted, is not his testimony to be acted on with caution—great caution? Would defendant's counsel present to us, in earnest, the proposition that if a witness is to be distrusted, still his testimony is to be taken without caution?

3. The instructions concerning circumstantial evidence, considered together, show no error.

4. The jury found the defendant guilty of "larceny in the second degree." The defendant urges that this is no offense known to the law. A complete answer is found in the Penal Code, § 486: "Larceny is divided into two degrees, the *first* of which is termed grand larceny, the *second*, petit larceny." Here the degrees are given, and a name is given to each degree. We think the language of the statute justified the use of the term "larceny in the second degree," as standing for and representing "petit larceny."

5. The defendant was sentenced to imprisonment for six months, and to pay a fine of \$365, with the addition "that in case said fine is not paid at the expiration of said term of six months, he shall be confined in said county jail until said fine be satisfied, not exceeding three hundred and sixty-five days from the expiration of said term of six months, at the rate of one dollar per day for each day of said imprisonment." Petit larceny is punishable by fine or imprisonment, or both. Penal Code, § 490. A judgment that the defendant pay a fine, may also direct that he be imprisoned until the fine be satisfied, specifying the extent of imprisonment, which must not exceed one day for every dollar of the fine. Section 1205, Penal Code. This last section is not, as contended for by appellant, limited to cases of fine only, but applies to cases of fine whether the fine be coupled with a sentence of imprisonment, or whether the fine stand alone as the only punishment. Judgment affirmed.

2 Cal. Unrep. 409

DYER v. HEYDENFELDT. (No. 7,847.)

Filed November 29, 1884.

1. ORDER FOR GRADING STREET—NOTICE OF INTENTION—PETITION.

The statute of 1872 authorized the board of supervisors of the city and county of San Francisco, on recommendation of the street superintendent, to give notice of their intention to order that Broadway, from the west line of Buchanan to the west line of Webster street, be graded, when two blocks on each side of said portion of Broadway had been graded, without any petition for such order.

2. SAME—RECOMMENDATION OF STREET SUPERINTENDENT—FINDINGS.

Where the matter was not at issue, and neither party introduced any evidence thereon, it was erroneous for the court to find that such street work was ordered without the recommendation of the superintendent of streets.

3. PRACTICE—DISMISSAL AS TO CERTAIN DEFENDANTS.

A dismissal, in a street-assessment suit, as to defendants not having any interest in the land assessed, is not error prejudicial to other defendants.

Department 2. Appeal from the superior court of the city and county of San Francisco.

J. M. Wood, for appellant.

Bishop & Fifield, for respondent.

BY THE COURT. The court found that before the board of supervisors gave notice of their intention to order that Broadway, from the west line of Buchanan street to the west line of Webster street, be graded, "two blocks upon each side of the above-mentioned portion of said Broadway street" had been graded. That being so, the board of supervisors were authorized, upon the recommendation of the superintendent of streets, etc., to give notice of their intention to order said grading without any petition therefor. St. 1872, c. 562, § 4, p. 806. But the court also found that the work was not ordered upon the recommendation of said superintendent. This finding is attacked on the ground that there is no evidence to support it. It was unnecessary for the plaintiff to allege what proceedings had been had prior to the issuance of the assessment, diagram, and certificate, (Id. § 13;) and the defendant did not allege in his answer that the work was not ordered on the recommendation of said superintendent. In the absence of any such averment in the answer, the fact was not in issue. Neither party introduced any evidence which tended to prove or disprove that the superintendent had recommended that the work should be ordered. On this ground we think the motion for a new trial ought to have been granted.

It does not appear that any objection was made to the dismissal of the action as to all the defendants except the respondent. In *Clark v. Porter*, 53 Cal. 409, there was an objection to the dismissal of the action as to any of the defendants. It is found that none of the defendants as to whom the action was dismissed, had any interest in the land assessed. That being so, the dismissal could not prejudice those as to whom the action was not dismissed. Judgment and order reversed.

66 Cal. 182

JESSEN *v.* SWEIGERT. (No. 8,515.)

Filed November 29, 1884.

NEGLIGENCE—INJURY FROM DEFECTIVE AWNING—LIABILITY.

The owner of a building, who maintains an awning thereon over the public street, though licensed to do so by the city authorities on condition that the same be securely fastened, is liable in damages to one who, without fault on his part, is injured through neglect of the owner to keep such awning in repair, although, at the time of the injury, the building was occupied by a tenant.

Department 2. Appeal from the superior court of the city and county of San Francisco.

Loughborough & Newhall, for appellant.

A. P. Needles, for respondent.

SHARPSTEIN, J. If the defendant had both *owned* and *occupied* the building to which the awning that fell on the plaintiff was attached, the evidence, indubitably, would be sufficient to justify the verdict. But the defendant, while owning the building, did not occupy it. It was occupied by a tenant under a lease, in which the defendant did not covenant to keep the premises in repair. And it is urged by defendant's counsel that section 1941, Civil Code, did not impose on the lessor of this building any greater or other obligations in that respect than the common law did. Conceding that to be so, is not the evidence sufficient to justify the verdict? The fact of the awning having been suspended over the sidewalk by a prior owner of the building is not controverted; and there is evidence tending to prove that prior to the accident the defendant was told that the awning was in an unsafe condition, and that, on being so informed, she expressed an intention to have it repaired. This she denied when testifying in her own behalf. There being a material conflict in the evidence on this question, the jury alone could determine it.

In addition to the evidence above referred to, the plaintiff introduced an ordinance which prohibits any person owning or occupying any building fronting upon any public street from constructing or maintaining any awning before such building, unless such awning be securely placed. Conceding that this constituted a license, by virtue of which the owner of the building was authorized to erect or suspend an awning over a public street in front of his premises, it was a license to do so on condition that such awning should be securely placed. And so long as it continued to be so it might be maintained. As between himself and the public, the owner, by erecting the awning, became obligated to make and keep it secure. If the owner had covenanted with her tenant to keep the premises in repair, any one injured by reason of her failure to do so might have maintained an action against her or the tenant. Instead of entering into such an agreement with the tenant in respect of this awning, the owner did so with the public. In *Whalen v. Gloucester*, 4 Hun, 24, the defend-

ant had, under license similar to that above referred to, made a hole in the sidewalk and neglected to keep the cover of it in a proper condition. The premises were occupied by a tenant under a lease, which contained a covenant that the lessor should repair, etc. Commenting on this, the court said:

"It seems to be clear, therefore, that the defendant is liable, on both theories herein presented; namely, *upon her obligation to the public in her use of the street for her private purposes*, and upon her failure to keep the premises in repair, as between her tenant and herself, even if such relation of landlord and tenant, and the consequent possession of the latter, might otherwise excuse her."

Where one has secured a privilege from the public on a condition, he cannot, after availing himself of the privilege, avoid his obligation to perform the condition by leasing the premises. Here, the awning was erected by a former owner of the building, and has been maintained by the present owner, doubtless for her own profit. The portion of the building under the awning was used for a purpose which may have made an awning very convenient; and the fact of its being there may have enhanced the rent. Under these circumstances, we do not doubt the liability of the defendant to any one who, without fault, was injured through her neglect to keep the awning securely in place. It follows, therefore, that the instructions given by the court were as favorable to the defendant as the facts warranted, and that the court did not err in refusing to give those which it refused to give. The exceptions taken at the trial are, in our opinion, without merit. Judgment and order affirmed.

We concur: THORNTON, J.; MYRICK, J.

2 Cal. Unrep. 411

OAKLAND BANK OF SAVINGS v. APPELGARTH. (No. 9,636.)

Filed December 2, 1884.

1. APPEAL—CONFLICTING EVIDENCE.

Where evidence is conflicting, the judgment of the lower court will not be disturbed on appeal.

2. TENDER—OBJECTIONS—WAIVER.

By the statute (Code Civil Proc. § 2076) it is provided that the person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the amount or the kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards.

Department 1. Appeal from the superior court of Merced county.
J. K. Law, for appellant.

W. G. Goodfellow and *E. Jackman*, for respondent.

MORRISON, C. J. The plaintiff brought this suit to foreclose a mortgage on lands situate in Stanislaus county, and judgment was rendered for the defendant on the ground that the amount due on the

mortgage debt was duly tendered before suit brought. The principal object in the case seemed to be the institution of a suit before the defendant could make a legal tender of the amount due, and there seems to have been such a small interval of time between the tender and the filing of the complaint that it was scarcely appreciable. Why this anxiety to bring the suit before the defendant could make his tender is only to be accounted for by the fact that the plaintiff was desirous of collecting the percentage provided for in the mortgage to cover legal expenses. This mortgage had been sent to the attorney of the plaintiff at Merced, for foreclosure, before any steps looking towards a tender had been taken by the defendant; and the ascertainment of the fact that legal proceedings were about to be instituted probably stimulated the defendant to action, and prompted him to make the tender as speedily as possible. At all events, the testimony of the exact time when the tender was made, and that relating to the precise moment when the complaint was filed, was such as to raise a doubt which act was first in point of time. The court below found that the tender was first in point of time, and we are not prepared to say that such conclusion was not warranted by the evidence. On a disputed fact of this character the court would hardly strain a point to reach a different conclusion, and we are satisfied with that arrived at by the court below.

The third finding is, "that on the first day of September, A. D. 1882, at the hour of 2 P. M., and before the commencement of this action, defendant tendered to and offered to pay to plaintiff the sum of \$6,334.55 in United States gold coin in payment and satisfaction of said note and mortgage; that plaintiff did not make or specify any objection to said sum of \$6,334.55, or to the amount thereof, nor did plaintiff specify any other as the amount which it required, but then and there refused, and ever since has refused, to accept from defendant said sum or any part thereof. The defendant has at all times been ready and willing to pay plaintiff said sum of \$6,334.55, and did, at the time of filing his answer therein, bring into court and deposit therein for plaintiff said sum so tendered to plaintiff as aforesaid."

By section 2076, Code Civil Proc., it is provided that "the person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards."

Under the circumstances of this case, it was no great hardship for the plaintiff to be charged with the costs of the litigation, and we must affirm the judgment. Motion to dismiss the appeal denied. Judgment and order affirmed.

We concur: MYRICK, J.; ROSS, J.

66 Cal. 186

GRAY v. NOON and others. (No. 7,909.)

Filed December 2, 1884.

FINDINGS—FORMER JUDGMENT IN BAR—NONSUIT.

In an action on an undertaking for an injunction, where a former judgment is pleaded in bar, a finding that in such action the court rendered its *decision* in favor of defendants and against the plaintiff, does not find any *judgment* in favor of defendants and against the plaintiff. Such decision may have been in the nature of a nonsuit; and if a judgment had been entered thereon it would not have been a bar. Such finding fails to cover a material issue, and is therefore defective.

Department 2. Appeal from the superior court of the city and county of San Francisco.

William Reade, for appellant.

Jas. T. Noon, for respondents.

By THE COURT. In this cause, which is an action on an undertaking given on procuring an injunction, a judgment of the justice's court of the city and county of San Francisco between the same parties for the same cause of action was pleaded in bar. The court, as to this defense, found the facts as follows:

"That an action was brought upon said bond in the justice's court, city and county of San Francisco, May (*sic*) 25, 1879, for the sum of \$299.98 damages, and that said court, upon the eighth of April, 1879, rendered its decision in favor of the defendants and against the plaintiff."

This does not find any judgment in favor of defendants and against the plaintiff. It is a finding that the court rendered its decision in favor of defendants and against the plaintiff. Whether any judgment was pronounced or entered on this decision does not appear anywhere in the findings. The decision may have been one in the nature of a nonsuit, and if a judgment had been entered in accordance with such a decision, it would not have been a bar. The findings thus fail to cover a material issue, and are therefore defective. Under the circumstances, we think it best to reverse the judgment and order denying a new trial, and remand the cause for a new trial; and it is so ordered.

BOARD OF EDUCATION v. FRANKLIN. (No. 8,463.)

Filed December 5, 1884.

JUDGMENT AFFIRMED.

Department 2. Appeal from the superior court of the city and county of San Francisco.

G. F. & W. H. Sharp and *Jarboe & Harrison*, for appellant.

C. H. Parker, for respondent.

By THE COURT. Without the aid of any argument we have examined the record, and we think it discloses no material error. Judgment affirmed.

2 Cal. Unrep. 413

In re TREADWELL. (No. 9,761.)

Filed December 6, 1884.

ATTORNEY AT LAW—DISBARMENT OR SUSPENSION.

Charges against an attorney at law, which, if proven, would not clearly constitute a cause for suspension or removal under the provisions of the Code, (Code Civil Proc. § 287,) will not be investigated on proceedings to remove him.

In bank. Proceedings for disbarment of an attorney.

A. C. Adams and *W. C. Belcher*, for respondent.

By THE COURT. Without expressing any opinion upon the question whether this court could remove or suspend an attorney for causes other than those specified in section 287, Code Civil Proc., we have concluded in this case not to investigate the charges which, if proven, would not clearly constitute a cause for suspension or removal under the provisions of the Code. Therefore, the objections to the charges growing out of respondent's transactions with the Bank of Woodland and with Adolph Heine and wife, or either of them, are sustained, and the specifications relating to said charges are ordered stricken out. And it is further ordered that the issue raised by respondent's plea of not guilty to the remaining charge be referred to A. P. Catlin, Esq., of Sacramento, to take testimony and report the same to this court with all convenient dispatch.

2 Cal. Unrep. 414

REYNOLDS *v.* ROBERTSON. (No. 8,490.)

Filed December 8, 1884.

ACTION ON A JUDGMENT—DEFENSE OF NUL TIEL RECORD.

The plea of *nul tiel record* is a good defense to an action on a judgment.

Department 2. Appeal from the superior court of the city and county of San Francisco.

T. C. Van Ness, for appellant.

H. C. Firebaugh, for respondent.

By THE COURT. The first defense set up in the answer of the defendant is substantially that of *nul tiel record*. Such a defense to an action on a judgment is a good one, and the court, therefore, erred in sustaining a demurrer to it. Judgment reversed, and cause remanded for a new trial.

66 Cal. 191

LUNDY v. CENTRAL PAC. R. Co. (No. 8,200.)

Filed December 8, 1884.

CARRIER OF PASSENGERS—CONSTRUCTION OF CONTRACT.

Contract for carriage of a passenger construed, and *held* to be a contract made by another carrier for and by authority of the defendant carrier, and action, therefore, properly brought against defendant for breach thereof.

Department 2. Appeal from the superior court of the city and county of San Francisco.

Wm. H. Fifield, for appellant.

Wilson & Wilson, for respondent.

THORNTON, J. The court below, in granting the nonsuit in this case, misconceived the meaning of the contract for passage between the plaintiff and defendant. In our view it was only required of the plaintiff that he present himself at the cars of the Union Pacific Railroad Company or of the defendant, and take passage at any time within nine days from the twelfth day of March, 1874. The plaintiff took passage on the twenty-first of the same month, and was illegally ejected from the cars of defendant by its servant on the morning of the twenty-fifth, following. The admission of defendant showed clearly that the contract for carrying the plaintiff from Omaha to San Francisco, though made by the Union Pacific Railroad Company, was made by authority of defendant. We have no doubt that the action was properly brought against the defendant. We see nothing in the evidence to uphold the ruling of the court below, nonsuiting the plaintiff, and the judgment and order denying a new trial are therefore reversed, and the cause remanded that a new trial may be had in accordance with the views herein expressed.

We concur: SHARPSTEIN, J.; MYRICK, J.

2 Cal. Unrep. 414

DOOLAN and others v. CUNNINGHAM, Adm'r, etc. (No. 8,280.)

Filed December 8, 1884.

1. CONCLUSIONS OF LAW—CLERICAL ERROR.

The use of the word "defendant" instead of "defendants" in conclusions of law, when clearly a clerical mispision, is not entitled to any regard on appeal.

2. JUDGMENT AFFIRMED.

Department 2. Appeal from the superior court of the city and county of San Francisco.

George W. Tyler, for appellants.

Cary & Troutt, for respondents.

By THE COURT. We have examined the record in this case and find it without error. The use of the word "defendant" instead of "defendants," in the conclusions of law, is so clearly a mere clerical misprision that we do not think it entitled to any regard. Judgment affirmed.

SAMUELS *v.* YOUNGER and Wife. (No. 8,476.)

Filed December 8, 1884.

JUDGMENT AFFIRMED.

Department 2. Appeal from the superior court of the city and county of San Francisco.

E. W. McGraw, for appellant.

Carl T. Graef, for respondent.

By THE COURT. The court below did not err in overruling the demurrer to the complaint. We find no error in the record, and the judgment is affirmed.

McCORMICK *v.* FITZPATRICK and others. (No. 8,267.)

Filed December 8, 1884.

JUDGMENT AFFIRMED.

Department 2. Appeal from the superior court of the city and county of San Francisco.

M. C. Hassett, for appellants.

F. J. Sullivan, for respondent.

By THE COURT. The demurrer to the complaint was properly overruled. We find no error in the refusal of the court to set aside the judgment against the defendants. Judgment and order affirmed.





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